No. 92-1736

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In The

Supreme Court of the United States

October Term, 1992

MELVIN MOSS,

Petitioner,

vs.

PARKS CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 28, 1993

QUESTION PRESENTED FOR REVIEW

Whether Congress reserved to the Secretary of the Consumer Product Safety Commission the power to "fill in the interstices" of the broadly worded Section 2(p)(1)(F) of the Federal Hazardous Substances Act, 15 U.S.C. § 1261(p)(1)(F), as to risks of injury and illness not covered by any federal regulation, or whether, in the absence of any clarifying regulations promulgated by the Secretary, the States can interpret and enforce their interpretations of this paragraph in light of Congress' expressed intent that the States adopt and implement enforcement mechanisms which parallel and complement the enforcement mechanisms of the Federal Hazardous Substances Act.

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* All parties in the United States Court of Appeals for the Fourth Circuit are named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Melvin Moss respectfully petitions the Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, issued on January 28, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 985 F.2d 736 and is set out in Appendix

A. No petition for rehearing or suggestion for rehearing en banc was filed.

The order of the United States District Court for the District of South Carolina, Greenville Division, is unreported. The court made an oral ruling from the bench on March 2, 1993, and entered summary judgment on March 3, 1993. The court's ruling and order are set out in Appendix B.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fourth Circuit were issued on January 28, 1993. Clerical corrections were made by the court *sua sponte* on March 3rd and April 6, 1993. No petition for rehearing or suggestion for rehearing en banc was filed.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. This petition is timely filed on April 28, 1993, which is the 90th day after the judgment was entered by the Fourth Circuit. Rule 13.1 of the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution states that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Federal Hazardous Substances Act (FHSA) appears at Sections 1260 *et seq.* of Title 15 of the United States Code. Section 1261(p) states in pertinent part that:

> The term "misbranded hazardous substance" means a hazardous substance . . . intended, or packaged in a form suitable for use in the household or by children, if the packaging or labeling of such substance is in violation of an applicable regulation issued pursuant to section 3 or 4 of the Poison Prevention Packaging Act of 1970 or if such substance, except as otherwise provided by or pursuant to section 2 [15 U.S.C. § 1262], fails to bear a label—
>
> > (1) which states conspicuously (A) the name and place of business of the manufacturer, packer, distributor or seller; (B) the common or usual name or the chemical name (if there be no common or usual name) of the hazardous substance or of each component which contributes substantially to its hazard, unless the Secretary by regulation permits or requires the use of a recognized generic name; (C) the signal word "DANGER" on substances which are extremely flammable, corrosive, or highly toxic; (D) the signal word "WARNING" or "CAUTION" on all other hazardous substances; (E) an affirmative statement of the principal hazard or hazards, such as "Flammable," "Combustible,"

> "Vapor Harmful," "Causes Burns," "Absorbed Through Skin," or similar words descriptive of the hazard; (F) *precautionary measures describing the action to be followed or avoided, except where modified by regulation of the Secretary pursuant to section 3 [15 U.S.C. § 1262];* (G) instruction, when necessary or appropriate, for first-aid treatment; (H) the word "poison" for any hazardous substance which is defined as "highly toxic" by subsection (h); (I) instructions for handling and storage of packages which require special care in handling and storage; and (J) the statement (i) "Keep out of the reach of children" or its practical equivalent, or, (ii) if the article is intended for use by children and is not a banned hazardous substance, adequate directions for the protection of children from the hazard, and
>
> (2) on which any statements required under subparagraph (1) of this paragraph are located prominently and are in the English language in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the label.

(Emphasis added).

Section 1261 note of Title 15 of the United States Code states that:

(b)(1)(A) Except as provided in paragraphs (2) and (3), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b).

(B) Except as provided in paragraphs (2), (3), and (4), if under regulations of the Commission promulgated under or for the enforcement of section 2(q) a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision of a State may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations.

STATEMENT OF THE CASE

Melvin Moss was severely injured in a fire and explosion on March 16, 1989, at a home near Greenville, South Carolina, which he was "fixing up" before moving in. At the time, he was using a mineral spirits paint thinner marketed by Parks Corporation under

its own label and sold in cans. When the volatile fumes from the thinner reached the pilot light in a kerosene heater in another room, they ignited and caused a flash fire which burned Mr. Moss over a substantial portion of his body.

Because Parks was a Massachusetts corporation, Mr. Moss brought suit in the United States District Court for the District of South Carolina, invoking that court's diversity jurisdiction under 28 U.S.C. § 1332.

The amended complaint alleged that because Parks' paint thinner label contained no statement of the ". . . precautionary measures describing the action to be followed or avoided . . ." in order to use the product safely, as required by 15 U.S.C. § 1261(p)(1)(F), it was misbranded. It further alleged that this omission constituted negligence *per se* under South Carolina common law, *see, Rayfield v. South Carolina Department of Corrections,* 297 S.C. 95, 374 S.E. 2d 910 (S.C. App. 1988), and that it rendered the product defective and unreasonably dangerous under the South Carolina Products Liability Act, *S.C. Code Ann.* §§ 15-73-10 *et seq.*, thus making Parks strictly liable for petitioner's injures.

The front and back of Parks' label appears, in actual size, in Appendix C.

The FHSA was passed in 1960 as the Federal Hazardous Substances Labeling Act, P.L. 86-613, 74 Stat. 372. Its purposes were three-fold: (1) ". . . to provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce and are intended or suitable for household use. . ." (2) "to advise the user of these hazardous substances in the use of the product" and (3) " . . . to provide a pattern which states may follow in enacting similar legislation." House Committee on Interstate and Foreign

Commerce, H.R. No. 1861, 86th Congress, Second Session (1960), reprinted in *United States Code, Congressional and Administrative News,* Vol. 2, 86th Congress - Second Session, at page 2833.

The Act contained no preemption language.

In 1966, Congress passed the Child Protection Act, P.L. 89-756, 80 Stat. 1303, which amended various provisions of the FHSA. Section 4 of the Child Protection Act added the first preemption language to the FHSA. It declared "null and void" any state law governing precautionary labeling on hazardous substances if that law required anything "which differs from the requirements or exemptions of this Act or the regulations or interpretations promulgated pursuant thereto." The House Committee on Interstate and Foreign Commerce noted that it was recommending "a limited preemption amendment which would encourage and permit states to adopt requirements identical with the federal requirements for substances subject to the federal act, and to enforce them to complement Federal enforcement . . ." H.R. 2166, 89th Congress, Second Session (1966), reprinted in *United States Code, Congressional and Administrative News*, Vol. 3, 89th Congress, Second Session, at pages 4095-4096.

Section 4 was amended in 1976 by Section 17 of the Consumer Product Safety Commission Improvements Act of 1976, P.L. 94-284, 90 Stat. 503. The amendments were intended to clarify the preemptive effect of federal law and to provide an administrative mechanism for states to adopt regulations which deal with a risk of illness or injury not covered by a federal regulation. Senate Committee on Commerce, S.R. No. 94-251, 94th Congress, Second Session, (1976), reprinted in *United States Code, Congressional and Administrative News,* Vol. 2, 94th Congress — Second Session, at pages 1003-1005 and 1009-1010. Significantly, neither Section 4 nor the 1976 amendments make the

slightest reference to state tort law. As amended, the preemption section has been codified at 15 U.S.C. § 1261 note:

> (b)(1)(A) Except as provided in paragraphs (2) and (3), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [15 U.S.C. § 1261(p) or 1262(b)] designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p)or 3(b) [15 U.S.C.S. §§1261(p), 1262(b)].
>
> (B) Except as provided in paragraphs (2), (3), and (4), if under regulations of the Commission promulgated under or for the enforcement of section 2(q) [15 U.S.C. § 1261(q)] a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision of a State may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations.

Paragraph (2) applies only to labels on hazardous substances used by a governmental entity. Paragraph (3) allows the CPSC to

exempt, by regulation, any state labeling requirement which is "designed to protect against a risk of illness or injury associated with a hazardous substance" if (1) compliance with the state regulation would not cause the labeling to violate the requirements of 15 U.S.C. § 1261(p)(1), (2) the state requirement provides "a significantly higher degree of protection for such risk of illness or injury" than the federal requirement, and (3) the state regulation does "not significantly burden interstate commerce."

To prove that the state regulation does not significantly burden interstate commerce, the state must provide evidence of (1) the technological and economic feasibility of complying with its requirement; (2) the cost of compliance; (3) the geographic distribution of the substance at issue; and (4) the probability that other states will seek a similar exemption.

Since common law failure to warn claims are resolved on a case by case basis by providing a general standard of care by which the trier of fact must judge the seller's warning, it is not practical for states to seek exemptions for tort claims under this procedure.

The FHSA dictates labeling requirements for thousands of household products other than insecticides, fungicides, rodenticides, and medicines.[1] It regulates products which are toxic (any substance which produces injury or illness through ingestion, inhalation or absorption through body tissues); poisonous; corrosive (any substance which, when in contact with living tissue will cause destruction of that tissue by chemical action); irritants (any substance which is not corrosive but which produces a local inflammatory reaction when in prolonged contact with living

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1. Labels for plant and animal poisons are governed by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 135 *et seq*, while labels for foods, drugs, and cosmetics are governed by the Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq*.

tissue); strong sensitizers (any substance which will cause allergic or photosensitive reactions); or which are flammable, combustible, or which generate pressure through decomposition or heat. 15 U.S.C. § 1261(f) and (p); 16 C.F.R. Part 1500.[2]

Of the ten labeling requirements in Section 1261(p)(1),[3] five are straightforward and can be easily satisfied: paragraph (A), which requires the name and address of the business which markets the product; paragraph (B), which requires the name of the hazardous substance being sold; paragraph (C), which requires the word "Danger" to be used on certain substances; paragraph (D), which requires either the word "Warning" or the word "Caution" on certain other substances; and paragraph (H), which requires the word "Poison" to be used on all highly toxic substances.

The remaining five requirements are much more generalized. They include paragraph (E), which requires a description of the principal hazard or hazards associated with using the product; paragraph (F), which requires a statement of "the precautionary measures to be followed or avoided" to use the product safely; paragraph (G), which requires instructions for first aid treatment; paragraph (I), which requires instructions for safe handling and storage; and paragraph (J), which requires either a warning to keep

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2. The list of hazardous substances covered by the Act reads like a "Who's Who" of household products: paint, paint thinners and turpentines; liquid fuels, including kerosene, gasoline, and lighter fluids; pressurized fuels such as propane and butane; all kinds of volatile carbon-based solvents; detergent products and household cleaners, including oven and drain cleaners which contain lye or other corrosives; charcoal briquettes; glues and adhesives; anti-freeze for automobiles; denatured and other non-ethyl alcohols; various household and automotive oils and lubricants; fireworks; substances sold in pressurized containers, and a host of other items.

3. See pages 3-4, *supra*, where they are set forth verbatim.

the product out of the reach of children, or, if the product is intended for use by children, "adequate directions for the protection of children . . ."

Unless there is a detailed CPSC regulation, initial compliance with paragraphs (E), (F), (G), (I) and (J) is thus largely dependent upon the soundness of the seller's judgment in deciding what to explain and how to explain it.

The Consumer Product Safety Commission (CPSC) has administered the FHSA since 1972. *See*, P.L. 92-573, § 30(a), 86 Stat. 1207, codified at 15 U.S.C. § 2079(a).

The Secretary's implementing regulations appear at 16 C.F.R. Part 1500. No regulation deals with "precautionary measures to be followed or avoided" and no regulation discusses the risk of explosions or flash fires which may result when vapors reach an open flame.[4]

Section 1500.3(b)(14) repeats verbatim the definition of "misbranded hazardous substance" which appears in 15 U.S.C. § 1261(p)(1); i.e., a substance whose label does not contain the information specified in that section of the Act. Section 1500.121 contains more detailed labeling requirements as to size, placement, prominence and conspicuousness of the information required by Section 1261(p)(1) and Section 1500.3(b)(14). Section 1500.121 does not explain, clarify, or elaborate upon the requirements of Section 1261(p)(1): it merely states, at Section 1500.121(a)(2)(ii) that "cautionary material, cautionary labeling, and cautionary labeling required by the Act mean all items of labeling required by Sections 2(p)(1) of the FHSA (repeated in 16 CFR 1500.3(b)(14)(i). . ."

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4. As Dr. Karnes notes, see pages 12-13, *infra*, the words "Combustible" and "Flammable" do *not* communicate this risk.

Only Section 1500.14(b)(3)(ii) requires anything additional: it states that mineral spirits labels must contain the statement "Harmful or fatal if swallowed" and "Call physician immediately." Nothing in any of the regulations, however, elaborates upon, clarifies, or explains what Section 1261(p)(1)(F) means when it requires labels to contain "precautionary measures describing the actions to be followed or avoided . . ."

In the proceedings below, petitioner argued that (1) the FHSA does not require any specific language to be used in warnings, *see, e.g., Chemical Specialties Manufacturers Association v. Allenby,* 958 F.2d 941, 950 (9th Cir. 1992) (*cert. denied,* 1992); (2) the language of 15 U.S.C. § 1261(p)(1)(F) imposes a broad requirement that manufacturers and sellers adequately warn about the precautionary measures necessary to safely use the product, and that the warnings required by this provision will of necessity vary with the nature of the product; (3) inherent in this requirement is a requirement that the explanation of precautionary measures be adequate to meaningfully communicate those measures to consumers; otherwise, any language, no matter how meager, would establish compliance with the Act as long as it made some remote or ambiguous reference to the precautionary measures; and (4) because the statutory language is so broad, the question of whether any given label is in compliance must be left to the finder of fact, i.e., to a judge or jury in common law tort actions, or to an administrative law judge in enforcement proceedings.

Petitioner opposed Parks' motion for summary judgment with an affidavit of Edward W. Karnes, Ph.D., a human factors engineer who specializes in the study of product warnings and how human beings react to those warnings Dr. Karnes opined that:

> [I]t is my professional opinion, to a reasonable degree of probability, that the label . . . does not comply with at least one of these requirements

> (in the Code of Federal Regulations), in that it does not contain an adequate working description of the hazard from fire and explosion; that merely putting the term "combustible" on the label does not in any way communicate to the average person that the 100% mineral spirits may evaporate, that the vapors may form a highly combustible mixture which may explode and create a flash fire upon contact with an open flame; that the label does not contain any description of the precautionary measures describing the action to be followed or avoided in order to use the product safely — in other words, it does not contain any statement that to use the product safely, it must never be used anywhere near an open flame; . . .
>
> It is also my opinion, as set forth in my deposition, that the warning used by the Parks Corporation on its label is wholly inadequate to convey the necessary information to the consumer about the dangers posed by explosions and fires and that such dangers posed are present when the 100% mineral spirits are used in proximity to an open flame.[5]

The district court rejected petitioner's contentions and Dr. Karnes' opinions, and the Fourth Circuit affirmed.

The Fourth Circuit held that because Parks' label contained some reference to the appropriate precautionary measures, it

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5. Parks' expert reached precisely the opposite conclusion.

complied with the generalized requirements of Section 1261(p)(1)(F). More significantly, however, it also held that the preemptive language in the FHSA barred petitioner's challenge to the adequacy of Parks' description because such a challenge would require an individualized determination by a judge or jury. This determination would require judges and juries to "fill in the interstices", or make more specific, the requirements of the Act, and by doing so, would establish state labeling requirements which differed from those of the Act simply because they were more specific.

The Court held that:

> As to the Plaintiff's contention that 15 U.S.C. § 1261(p)(1)(F) required a more complete warning, such as "in order to use the product safely, it must never be used near an open flame", Appellant's Brief at page 11, *this Court disagrees that Congress intended courts and juries to displace the Secretary of the CPSC in filling in the interstices found in section 1261(p)(1)(F).* Section 1261(p)(1)(F) implicates 15 U.S.C. 1262(b), which only vests authority in the Secretary to promulgate such reasonable variations or additional label requirements as he finds necessary for the protection of the public health and safety."

(Emphasis added) 985 F.2d at 742, Appendix A at page 15a.

This holding means that no state can enact a statute or administrative regulation or apply a common law tort rule to "fill in the interstices" of the broadly worded Section 1261(p)(1)(F). It also means that a state rule is barred even if the state seeks to regulate a "risk of injury" not specifically dealt with by the Act or by the Secretary's regulations.

Finally, it means that Congress' expressed desire for the States to adopt parallel and complementary enforcement mechanisms for the labeling of hazardous household substances will be thwarted: no state can enforce Section 1261(p)(1)(F) without either promulgating clarifying regulations or determining its scope on a case by case basis, and under the Fourth Circuit's opinion, they are prohibited from doing either.

REASONS FOR GRANTING THE WRIT

I

THE OPINION OF THE FOURTH CIRCUIT IN THIS CASE CONFLICTS WITH OPINIONS OF THE SECOND AND NINTH CIRCUITS

In the case at bar, the Fourth Circuit expressly held that the states could not "fill in the interstices" of Section 1261(p)(1)(F) by making its generalized requirements more specific, not even where doing so is a necessary incident of state tort claims or other state enforcement mechanisms.

The Ninth Circuit reached a contrary conclusion in *Chemical Specialties Manufacturers Association v. Allenby*, 958 F.2d 941, 950 (9th Cir. 1992) (*certiorari denied*, October 13, 1992, No. 91-1957):

> Furthermore, Proposition 65 warnings are not necessarily nonidentical to the warnings required under FHSA. *FHSA does not require any specific language in its warnings*. The Act merely requires (1) that labels contain the signal word "WARNING" or "CAUTION" and (2) words which describe the potential hazard. Consequently, a message such as the following

> could comply with both Proposition 65 and FHSA: "Warning, this product contains materials known to the State of California to cause cancer."

(Emphasis added)

Under the Ninth Circuit's reasoning, states can enact labeling requirements which are more specific than those of the FHSA, and which therefore "fill in the interstices" of the federal Act. Such specific state requirements are not "nonidentical" with the more generalized federal requirements because both could reasonably be interpreted as requiring the same information. The Ninth Circuit's holding thus strikes a balance between the unquestioned supremacy of the FHSA and the need for states to make its requirements more specific if they are to fulfill the expressed congressional desire that they adopt parallel enforcement mechanisms.

The Fourth Circuit's opinion also conflicts with the opinion of the Second Circuit, issued three weeks later, in *Toy Manufacturers of America, Inc. v. Blumenthal*, 986 F.2d 615 (2nd Cir. 1993). In *Blumenthal*, the plaintiff argued that a Connecticut statute which regulated warnings on children's toys was preempted by the FHSA. The Second Circuit disagreed, holding that

> [T]he Act focuses on consumer products intended for use or packaged in a form suitable for use in the household or by children. The scope of its coverage as to these products is extremely broad. Nevertheless, the Act does not purport to establish a comprehensive federal scheme of regulating hazardous substances found in the household. In fact, the FHSA does not itself ban any items or require

> any precautions. Instead, it authorizes regulations to be issued by the Consumer Product Safety Commission ("CPSC" or "Commission") pursuant to the Act, and sets guidelines to be followed by the CPSC in promulgating those regulations.
>
> The FHSA also permits a system of partial preemption, under which, in an area in which the Commission has not acted, state regulations may supplement the regulations adopted by the CPSC . . .
>
> That is, preemption obtains only where a state action regulates the same "hazardous substance" and the same "risk of illness or injury associated with [that] hazardous substance" which a FHSA regulation regulates.

(985 F.2d at 617). Thus, since the CPSC has not promulgated any regulations dealing with "precautionary measures" or with hazards from fire and explosion, under the Second Circuit's reasoning, petitioner's state tort claims would not be preempted, and state law could be used to fill in the regulatory gaps left by the Consumer Product Safety Commission.

Because two circuit courts of appeal[6] have ruled that the FHSA does not preempt state law claims in circumstances similar

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6. The District of Columbia Circuit, in *Ferebee v. Chevron Chemical Company*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1984), went so far as to hold that state tort claims were not preempted under any circumstances, even where those claims imposed requirements which differed significantly from the FIFRA requirements. *Ferebee*, however, was decided eight years before this Court's decision in *Cipollone v. Ligget Group, Inc.*, __ U.S. __ (1992).

to those in which petitioner's case arose, and because the Fourth Circuit reached a contrary conclusion, certiorari should be granted to resolve the conflict.

II

CLAIMS THAT STATE TORT REMEDIES ARE PREEMPTED BY FEDERAL LAW CONTINUE TO POSE THORNY PROBLEMS FOR THE LOWER FEDERAL AND STATE COURTS

Lower courts have continued to struggle with preemption claims since this Court decided *Cipollone v. Ligget Group, Inc.*, __ U.S. __ (1992).

In two cases involving the preemption language in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), [7] the Court summarily vacated circuit courts of appeals decisions which found that FIFRA preempted state failure to warn tort claims and remanded for further proceedings in light of *Cipollone*. *See, Papas v. Upjohn Company*, 926 F.2d 1019 (11th Cir. 1991), cert. granted and judgment vacated, No. 90-1837, June 30, 1992, and *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers*, 959 F.2d 158 (10th Cir. 1992)(*cert. granted and judgment vacated sub nom Arkansas-Platte & Gulf Partnership v. Dow Chemical*, No. 92-203, October 13, 1992). On remand, both circuits reiterated their original opinions and again found preemption of state tort claims. *See, Papas v. Upjohn Company*, 985 F.2d 516 (11th Cir. 1993) and *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993).

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7. As the Fourth Circuit noted below, the preemption language in the FIFRA is "nearly identical" with the preemption language in the FHSA. 985 F.2d 740, n.3.

The Ninth Circuit, which found no preemption of point of sale warnings by either the FIFRA or the FHSA in *Allenby, supra,* heard arguments on April 7, 1993, in another FIFRA preemption case, *Montana Pole & Treating Plant v. L.F. Lauks*, Nos. 91-36024 and 91-36101. The district court opinion, which is reported at 775 F. Supp. 1339 (D. Mont. 1991) held that FIFRA did not preempt state failure to warn claims. It specifically rejected the reasoning of the Eleventh Circuit in *Papas, supra*, and followed the District of Columbia Circuit's holding in *Ferebee, supra.*

FIFRA preemption issues are also arising in the state court systems. *See, e.g., Davidson v. Velsicol Chemical Corporation,* 834 P.2d 931 (Nev. 1992)(*rehearing denied*), petition for certiorari denied April 26, 1993, No. 92-1430.

In addition to its decision in *Arkansas-Platte, supra,* the Tenth Circuit has addressed claims of state tort law preemption by the Federal Aviation Act of 1958, 49 U.S.C. App. §§ 1301 *et seq. Cleveland v. Piper Aircraft Corporation*, 985 F.2d 1438 (10th Cir. 1993) (no preemption of state tort claims).

These decisions, when considered along with the conflicting decisions by the Fourth Circuit in the case at bar and by the Second and Ninth Circuits in *Blumenthal* and *Allenby*, demonstrate the need for further, substantial guidance from this Court, and in particular, for guidance as to claims under both the Federal Hazardous Substances Act and the Federal Insecticide, Fungicide and Rodenticide Act.

III

THE OPINION OF THE FOURTH CIRCUIT WOULD INVALIDATE THE HAZARDOUS SUBSTANCES LABELING STATUTES OF AT LEAST TEN STATES AND WOULD SEVERELY LIMIT THE SCOPE OF THESE STATUTES IN AN ADDITIONAL SIXTEEN STATES

Twenty-six states[8] have honored Congress' request that they adopt enforcement mechanisms for the proper labeling of hazardous household substances which parallel and complement the enforcement mechanism of the FHSA.[9]

Of these twenty-six states, at least ten — Connecticut, Florida, Massachusetts, Michigan, Montana, New Hampshire, Oklahoma, Rhode Island, Tennessee and Wisconsin — specifically allow state regulatory agencies to "fill in the interstices" of Section 1261(p)(1)(F) by promulgating regulations concerning the necessary "precautionary measures" to be described on the labels of hazardous substances.

Connecticut's statute is typical of the other nine. *Conn. Gen. Stat.* § 21A-335(E) (1992) defines hazardous substances as those covered by the FHSA. Section 21A-335(O) contains labeling requirements which are identical to those in 15 U.S.C. 1261(p)(1). Section 21A-335(O)(1)(F) allows the state Commissioner of Consumer Protection to modify by regulation the generalized statement of "precautionary measures to be followed or avoided" to use the product safely. Section 21A-342 authorizes the Commissioner to "promulgate such regulations as are required for the efficient enforcement of this chapter and shall cause such

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8. The laws of these twenty-six states are summarized in Appendix D.

9. *See*, H.R. 2166, quoted at page 7, *supra*.

regulations to conform, insofar as practicable, with the regulations established pursuant to the Federal Hazardous Substances Act."

Under the Fourth Circuit's opinion, the statutes of Connecticut, Florida, Massachusetts, Michigan, Montana, New Hampshire, Oklahoma, Rhode Island, Tennessee and Wisconsin and all of their implementing regulations would be invalid to the extent they imposed a more specific requirement than that imposed by the FHSA, because according to the Fourth Circuit more specific means "different" or "nonidentical" and is therefore forbidden — even in the absence of a CPSC regulation which concerns the same risk covered by the state regulation.

For the same reason, the scope of the regulatory statutes and administrative regulations of the sixteen states which have not specifically dealt with Section 1261(p)(1)(F) precautionary measures are severely restricted because their regulatory agencies cannot promulgate or enforce any requirement which is more specific then the language in Section 1261(p)(1).

Finally, no state could challenge the adequacy of any label on a case by case basis as long as the label contained some meager or ambiguous reference to the information required by the FHSA, even if the warning was confusing.[10] Such a challenge to the adequacy of the warnings would of necessity require the state regulatory agency to "fill in the interstices" of Section 1261(p)(1) and analyze each label in light of the nature of the product, the hazards which it posed to the public, the appropriate precautions to be taken in light of those hazards, and the age of the user. This analysis would be prohibited by the Fourth Circuit because it

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10. The FHSA does not require warnings to be expressed in plain English. Jargon, even though incomprehensible to most people, would technically comply with the Act, at least under the Fourth Circuit's decision, although it utterly failed to communicate anything to consumers.

invariably requires the regulatory agency to ascend from the generalities of the FHSA to the specifics of the case before it.

If indeed Congress intended to limit so severely the enforcement powers of the states, a contention which petitioner entirely rejects, that determination is too important to be left to the circuit courts of appeal. It should be made now, by this Court, to resolve the uncertainty which surrounds the validity of the hazardous substance regulatory statues of over half of the states in light of the Fourth Circuit's ruling.

IV

THE FOURTH CIRCUIT'S OPINION WILL VIRTUALLY ELIMINATE STATE TORT REMEDIES FOR FAILING TO ADEQUATELY WARN ABOUT HAZARDOUS SUBSTANCES

State tort remedies which impose damages are a form of regulation and enforcement, *see San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959), *Cipollone v. Ligget Group, Inc.*, __ U.S. __ (1992), which is not specifically preempted by the FHSA. Indeed, the preemption section fails to even mention state tort law, and discusses only state regulatory statutes as being the objects of concern. At any event, preemption under the FHSA is limited to inconsistent labeling requirements only. States remain free to select their own enforcement mechanisms, as long as they do not enforce labeling requirements which differ from those of the FHSA.

The Fourth Circuit agreed with this general statement of the law, 985 F.2d at 741, Appendix A at pages 8a-11a. Nonetheless, if state judges and juries cannot "fill in the interstices" of Section 1261(p)(1), no state judge or jury will ever be able to decide whether a label provides adequate warnings of either the

precautionary measures, the hazards associated with the product, instructions for safe handling and storage, first aid, or use by children: any instruction provided by the manufacturer, no mater how incomplete or unclear, will satisfy the requirements of the FHSA unless the Secretary of the Consumer Product Safety Commission determines otherwise.

Thus, while state tort remedies for inadequate labeling remain technically available under the Fourth Circuit's ruling, the reality of that ruling is that these claims will never be successful.

Filling in the interstices of the law on a case by case basis is inherent in our system of tort law. If that power is removed, state tort remedies are eliminated from the states' arsenal of enforcement mechanisms.

With the exception of Wyoming, all fifty states and the District of Columbia allow claims for negligent or strict liability failure to warn.[11] Thirty-four states and the District of Columbia have adopted the rule that the violation of a statute or regulation is negligence *per se*.[12] In the remaining sixteen states, violation of a statute or regulation is either evidence or a rebuttable presumption of negligence. Finally, at least nineteen states and the District of Columbia have held that violation of a federal statute or regulation is negligence per se;[13] no state has reached a contrary conclusion.

If the Fourth Circuit is correct, no state can sanction a failure to provide an adequate explanation of "the precautionary measures

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11. *See* Appendix E for a listing of case citations on this point.

12. *See* Appendix F for a listing of case citations on this point.

13. *See* Appendix G for a listing of case citations on this point.

to be followed or avoided" in using the product safely because no state can determine when a label is inadequate once it provides the most meager of explanations. For the same reason, no state could sanction a failure to provide adequate information about the hazards associated with using the product, about proper storage and handling, about first aid measures, or about safe use by children.

This limitation on state power not only restricts state regulatory agencies: it will drive the vast majority of state tort claimants from the courthouse, and it will do so even though Congress did not express any intention to preclude state tort remedies.

This Court has long held that the right to compensation under state tort law is "not to be abrogated unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." *Nader v. Allegheny Airlines*, 426 U.S. 290, 298, (1976), *quoting from Texas and Pacific Railroad Company v. Abilene Cotton Oil Company*, 204 U.S. 426 (1907). *See also, Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238, 256 (1984).

The extraordinary strength of the presumption against preemption of state tort remedies by federal regulatory statutes flows from at least two fundamental considerations. First, the use of tort remedies to compensate for personal injuries "is a subject matter of the kind the court has traditionally regarded as properly within the scope of state superintendence" as part of the states' historic police powers in the areas of health and safety. *Florida Lime and Avocado Growers, Inc., v. Pole*, 373 U.S. 132, 144, (1963). In such cases, courts must "start with the presumption that the historic police powers of the states were not to be superseded by the Federal act unless that was the clear and manifest purpose of

Congress." *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230, (1947); *Jones v. Rath Packing Company*, 430 U.S. 519, 525, (1977).

No such "clear and manifest purpose" exists unless Congress has expressly preempted "the precise and specific state action, when compliance with both state and federal law would be impossible, or when the state's law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Ferebee*, at 1542.

Second, the right to tort compensation serves a wholly distinct purpose from the purposes of direct regulation, and the Supreme Court has repeatedly refused to find implicit preemption by federal statutes of state laws that address concerns not addressed by Congress. *See, Silkwood v. Kerr McGee Corporation, supra,* at 464 U.S. 251.

The Fourth Circuit's opinion, which effectively bars state failure to warn claimants from recovering for injuries caused by inadequately labeled hazardous substances, should be re-examined in light of these principles.

CONCLUSIONS

For all of the above reasons, the Court should issue a writ of certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit in the instant case.

Respectfully submitted,

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April 28, 1993

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND SUA SPONTE ORDERS CORRECTING THAT OPINION

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1354

Melvin Moss,

Plaintiff-Appellant,

v.

Parks Corporation,

Defendant-Appellee.

No. 92-1475

Melvin Moss,

Plaintiff-Appellant,

v.

Parks Corporation,

Defendant-Appellee

Appeals for the United Stated District Court
for the District of South Carolina, at Greenville.
Henry Michael Herlong, Jr., District Judge.
(CA-90-2913-6)

Appendix A

Argued: November 30, 1992

Decided: January 28, 1993

Before RUSSELL and WILKINSON, Circuit Judges, and MORGAN, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Morgan wrote the opinion, in which Judge Russell and Judge Wilkinson joined.

COUNSEL

ARGUED: Ralph Ogden, WILCOX & OGDEN, P.C., Denver, Colorado, for Appellant. Gary Thomas Culbreath. Yolanda Coker Courie, COLLINS & LACY, Columbia, South Carolina, for Appellee. **ON BRIEF:** Joseph A. Mooneyham, HARRIS & GRAVES, P.A., Greenville, South Carolina, for Appellant.

OPINION

MORGAN, District Judge:

The Plaintiff in this case, Mr. Melvin Moss, suffered severe burns when fumes from paint thinner he was using erupted into flames. The Plaintiff brought suit against defendant Parks Corporation ("Parks"), the paint thinner's manufacturer, alleging five causes of action based upon a failure to warn pursuant to the Federal Hazardous Substances Act's ("FHSA") labeling requirements found at 15 U.S.C.A. § 1261(p)(1)(F) (West Supp. 1992). Parks moved for summary judgment on the basis that the Plaintiff's counts of failure to warn were preempted by the FHSA and its regulations promulgated at 16 C.F.R. § 1500 et seq. (1991).

Appendix A

The district court granted Parks' motion, finding the paint thinner had been properly labeled in compliance with federal law. This Court agrees that the paint thinner was properly labeled in accordance with the applicable federal standards and thus affirms the judgment of the district court.

I.

The Plaintiff, a resident of South Carolina, purchased 100% mineral spirits paint thinner manufactured by the defendant Parks. On March 16, 1989, the Plaintiff alleges he was injured while using the paint thinner to clean paint spills in a bedroom he was refinishing in his house. The Plaintiff testified that he read the front and back of the can prior to using the product. (Supp. J.A. 100). The label contained the following warnings: "DANGER," "COMBUSTIBLE," and "Keep away from heat and open flame." (J.A. 1). The Plaintiff poured two pints of the paint thinner on the floor. There was a kerosene heater in another room across the hall, but the Plaintiff testified that he believed the heater was off while he was painting and cleaning. The Plaintiff's expert witnesses testified that the paint thinner created a "mist" that wafted across the hall to the room where the kerosene heater was located. According to the Plaintiff's experts, the "mist" was ignited by the kerosene heater's pilot lighter and exploded into flames. The resulting flash fire burned a substantial portion of the Plaintiff's body.

The Plaintiff brought this diversity action against Parks on December 7, 1990 and filed an amended complaint on January 21, 1992. The Plaintiff alleged five causes of action, three of which are based upon a failure to warn pursuant to the FHSA's labeling requirements located at 15 U.S.C. § 1261(p)(1)(F). Specifically, count I alleged Parks misbranded its paint thinner in violation of 15

U.S.C. § 1261 et seq; counts II and III alleged that Parks' noncompliance with federal law constituted negligence *per se* under both federal and state law; count IV alleged Parks was strictly liable under state law; and count V realleged his products liability count based entirely on South Carolina law. The Plaintiff admits count V is preempted by § 1261, and the Court finds that count IV is similarly preempted.

The Plaintiff maintained that the paint thinner was sold in a defective condition and was unreasonably dangerous because the label did not adequately warn against the hazards from fire and explosion. The Plaintiff argues that Parks violated the FHSA as its paint thinner's label failed to "state[] conspicuously . . . precautionary measures describing the action to be followed or avoided . . ." 15 U.S.C. § 1261(p)(1)(F). That is, the Plaintiff contends that the presence of the warnings "DANGER," "COMBUSTIBLE," and "Keep away from heat and open flame" were insufficient to alert a layperson to the possibility of a flash fire from the thinner's "mist" coming in contact with the pilot light of a kerosene heater in another room.

Parks moved for summary judgment on the basis that the Plaintiff's claims of failure to warn were preempted by the FHSA and its regulations found at 16 C.F.R. § 1500 et seq.[1] On March 3, 1992, the district judge entered summary judgment in favor of Parks and dismissed the Plaintiff's suit in its entirety. This district court found the paint thinner had been appropriately labeled and

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1. Parks raised a cross appeal on the issue of the district court's failure to conduct an *in camera* hearing to compel production of three letters provided by Moss' attorneys to one of Moss' expert witnesses. As this Court affirms the district court's entry of summary judgment against Moss, the Court need not consider the merits of Parks' cross appeal.

therefore complied with federal regulations. (J.A. 85-87). The Plaintiff now appeals from the district court's order.

II.

Orders granting summary judgment are reviewed under a de novo standard. *Perini Corp. v. Perini Const., Inc.*, 915 F.2d 121 (4th Cir. 1990). "Summary judgment is proper only when there is no genuine issue of material fact. F.R.Civ.P. 56(c). In other words, to grant summary judgment the Court must determine that no reasonable jury could find for the nonmoving party on the evidence before it." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The district court ruled that Parks

> has complied with the requirements of the regulations as they apply in this case, inasmuch as we are dealing with the mineral spirits requirements of the regulations.
>
> The court finds that the requirements are controlling . . . as far as the requirements are concerned in this case, and that there is no issue of fact as to the defendant having complied with the regulations.

(J.A.86). The district judge added that "the labeling requirements preempted any other causes of action and are controlling . . . ." *Id.* On appeal, Parks argues that in enacting the FHSA, Congress completely preempted all common law tort actions. If this is so, then the Plaintiff's cause of action fails, whether or not Parks complied with the FHSA's regulations. Accordingly, the Court

will first address the preemption issue before considering whether Parks' label satisfies the applicable federal standards.

A.

The doctrine of preemption, the resolving of conflicts between federal and state law, flows from the Supremacy Clause of the Constitution. *See* U.S. Const. Art IV, § 2. In *Worm v. American Cyanamid Company*, this Court held that

> Preemption may occur on two bases, the first of which turns on discovering the intent of Congress. Congress may expressly provide that federal law supplants state authority in a particular field or its intent to do so may be inferred from its regulating so pervasively in the field as not to leave sufficient vacancy within which any state can act. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). But even absent an express or implied congressional intent to preempt state authority in a field, state law is nevertheless preempted by operation of law to the extent that it actually conflicts with federal law. *See Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2482 (1991).

970 F.2d 1301, 1305 (4th Cir. 1992) (citations omitted). The issue before the Court in this case is whether Congress intended to preempt the regulations of hazardous substances to such a degree as to preclude claimants from suing private parties for money damages for alleged violations of the FHSA under either the statute itself or through a state law tort action.

Appendix A

The FHSA was enacted in 1960. The purpose of the law was to "provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce and are intended or suitable for household use." House Comm. On Interstate and Foreign commerce, Federal Hazardous Substances Labeling Act, H.R. Rep. No. 1861, 86th Cong., 2d Sess. 2 (1960), *reprinted in* 1960 U.S.C.C.A.N. 2833, 2833. As enacted, the FHSA did not contain a preemption section. However, when the Act was amended in 1966, the legislative history discussed the impracticality of having the states produce potentially fifty different labels for a particular hazardous substance. Congress recommended "a limited preemption amendment which would encourage and permit states to adopt requirements identical with the federal requirements for substances subject to the Federal Act, and to enforce them to complement Federal enforcement . . ." House Comm. On Interstate and Foreign Commerce, Child Protection Act of 1966, H.R. Rep. No. 2166, 89th Cong., 2d Sess. 3 (1966), *reprinted in* 1966 U.S.C.C.A.N., 4095, 4096. The 1966 amendments added the following limited preemption provision which provides

> if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [15 U.S.C. §§ 1261(p) or 1261 (p)] designed to protect against a risk of illness or injury associated with the substance, no State . . . may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury *unless such cautionary labeling requirement is identical to the labeling requirement under 2(p) or 3(b).*

Appendix A

15 U.S.C. § 1261 note (b)(1)(A) (emphasis added).

Thus, while it is clear that Congress intended to preempt state laws proposing labeling requirements not identical to the FHSA's regulations, the question remains whether that is sufficient to completely preempt state law tort actions for non-compliance with the federally mandated labels. This issue is a matter of first impression in this Circuit. However, this Court recently addressed the same issue under a similar federal statute. *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir. 1992). In *Worm*, this Court considered whether the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), a pesticide licensing and labeling statute, 7 U.S.C.A. § 136 et seq. (West 1988), preempts state common law and tort actions alleging the mislabeling of pesticides. FIFRA provides that states may regulate the "sale or use" of federally registered pesticides to the extent such regulations do not permit any sale or use prohibited by FIFRA, but states "shall not impose or continue in effect any requirements for labeling or packaging *in addition to or different from* those required under this subchapter." *Id.* at 1305 (emphasis added). From this language, this Court concluded that "Congress did not reveal an intent to supplant state authority" beyond the area of labeling and packaging. *Id.* at 1306. "With respect to *labeling*, however, the federal law sets forth detailed requirements . . . and directs that no additional or different labeling requirements may be imposed by the states." *Id.* (emphasis in original). This Court rejected the Plaintiff's argument which attempted to distinguish between state labeling requirements and common law tort actions, namely that state tort law "can lead only to the payment of damages and not to a required label alteration." *Id.* at 1307. This Court held the distinction illusory: "[i]f federal law mandates a specific label and permits nothing additional or different, it can hardly be urged that a state tort duty based on a warning requirement that is more elaborate and different does not conflict.

The manufacturer in that case cannot comply with both." *Id.*

Worm held that FIFRA preempted the Plaintiff's failure to warn claims as the Plaintiff sought "more elaborate or different" regulations than those promulgated pursuant to FIFRA. However, *Worm* also held that states may regulate so long as any state law is not different from the federal standard. *Id.* at 1308. This Court pointed out, for example, that "if the Maryland common law recognized a tort based on the breach of a federally imposed standard, the [plaintiff] would be able to pursue that claim without conflicting with federal law." *Id.* This Court concluded that

> if state law adopts or imposes a labeling requirement that is the same as the federal statute, even if the state law provides compensation or other remedies for a violation, so long as Congress chooses not to explicitly preempt the consistent law, it will not be said to be in conflict with federal law.

Id. at 1306 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) ("No doubt there is tension between the conclusion that safety regulation [of nuclear energy] is the exclusive concern of the federal law and a conclusion that a State may nevertheless award damages based on its own law of liability . . . [but because] Congress intended to...tolerate whatever tension there was . . . [w]e can do no less.")).[2]

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2. *See also Cipollone v. Ligget Group, Inc.*, 112 S.Ct. 2608 (1992). In *Cipollone*, the Supreme Court held that Federal Cigarette Labeling and Advertising Act of 1965, as amended by the Public Health Cigarette Smoking Act of 1969, preempted state law failure to warn claims against cigarette manufacturers to the extent they required a showing that manufacturers' post-1969 advertising should have included additional warnings. However, the court held that this

(Cont'd)

Appendix A

Applying the reasoning of *Worm* to the present case,[3] in an area of limited Congressional preemption such as the FHSA, a common law tort action based upon failure to warn may only be brought for non-compliance with existing federal labeling requirements. In actions such as the present one, if the plaintiff

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(Contd)

> does not mean that [the 1969 act] preempts all common law claims. . . . [W]e must look to each of petitioner's common law claims to determine whether it is in fact pre-empted. . . . Thus, insofar as claims under either failure to warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated warnings, those claims are pre-empted.

Id. at 2621 (footnotes omitted). Thus, this Court's holding in *Worm* comports with that in *Cipollone*. To the extent Moss seeks "additional, or more clearly stated warnings," his claim is preempted by the FHSA. To the extent Moss contends Parks failed to comply with federally-mandated labeling requirements, his claim is not preempted.

3. The United States Court of Appeals for the Ninth Circuit noted that "[t]he preemption issues arising under FHSA are identical to those arising under FIFRA." *Chemical Specialties Mfg. Ass'n Inv. v. Allenby*, 958 F.2d 941, 945 (9th Cir.) *cert. denied*, 113 S. Ct. 80 (1992) (preemption clause in FHSA leaves cautionary labeling to the federal government while allowing states to regulate the sale and use of dangerous chemicals). We agree. The preemption language of the two statutes is nearly identical. FHSA provides that "no State . . . may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging unless such cautionary labeling requirement is identical to the labeling requirement [of this section]." 15 U.S.C. § 1261 note (b)(1)(A). FIFRA mandates that "[s]uch state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C.A. § 136v(b) (West 1982).

request a label that is "more elaborate or different" than the one required by the FHSA and its regulations, the claim is preempted. However, it appears to the Court that unlike the plaintiff in *Worm*, the Plaintiff limits his allegations in counts I, II and III to Parks' failure to label the paint thinner in accordance to the regulations found in 15 U.S.C. § 1261(p) and 16 C.F.R. § 1500 et seq. As such, the Court disagrees with Parks that the Plaintiff's tort action based on counts I, II and III is preempted as a threshold matter without a factual undertaking on the merits of his claim. Accordingly, this Court holds that so long as a plaintiff charges a manufacturer with violations of FHSA-mandated labeling requirements and does not seek more stringent labeling requirements, the Plaintiff's common law tort action for damages is not preempted. This is the case as to counts I, II, and III. To the extent the Plaintiff seeks warnings that are more elaborate or different from those issued by Congress and promulgated by the CPSC, as in counts IV and V, the Plaintiff's claim is preempted. Whether this Plaintiff's remaining counts survive a summary judgment motion, however, is dependent upon whether there is a genuine issue of material fact as to Parks' compliance with federal law.

B.

Having determined that the FHSA does not preempt a claim for non-compliance with federally-mandated labeling requirements, the Court now turns to the issue of Parks' compliance with those regulations with respect to the paint thinner warnings in issue. The label contained the following warnings: "DANGER," "COMBUSTIBLE," and "Keep away from heat and open flame." (J.A. 1). The district court granted Parks' motion for summary judgment on the grounds that the paint thinner's warnings complied with federal law. This Court agrees that the warning was in compliance with those regulations, and accordingly, affirms the judgment of the district court.

Appendix A

Section 1261(p) of Title 15 of the United States Code defines a misbranded substance as follows:

> The term "misbranded hazardous substance" means a hazardous substance . . . intended, or packaged in a form suitable, for use in the household or by children, if the packaging or labeling of such substance is in violation of an applicable regulation issued pursuant to section 1472 or 1473 of this title or if such substance, except as otherwise provided by or pursuant to section 1262 of this title, fails to bear a label—
>
> > (1) which states conspicuously . . . (C) the signal word "DANGER" on substances which are extremely flammable, corrosive, or highly toxic; (D) the signal word "WARNING" or "CAUTION" on all other hazardous substances; (E) an affirmative statement of the principal hazard or hazards, such as "Flammable", "Combustible", "Vapor Harmful", "Causes Burns", "Absorbed Through Skin", or similar words descriptive of the hazards; (F) precautionary measures describing the action to be followed or avoided, except where modified by regulation of the Secretary pursuant to section 1262 of this title; . . .

15 U.S.C. § 1261(p). The Plaintiff alleges Parks' label violates 15

U.S.C. § 1261(p)(1)(F) which requires labels to describe the precautionary measures to be followed or avoided, "except where modified by regulation of the Secretary pursuant to section 1262 of this title . . . ." Section 1262 grants the Secretary of the Consumer Product Safety Commission ("CPSC"), the administrative agency responsible for oversight of the FHSA, authority to promulgate "such reasonable variations or additional label requirements as he finds necessary for the protection of the public health and safety," 15 U.S.C. § 1262(b) (West supp. 1992).

The CPSC's labeling requirements for mineral spirits are found at 16 C.F.R. § 1500 et seq. The regulations require, inter alia, that "hazardous substances bear certain cautionary statements on their labels," such as "signal words," "affirmative statements of the hazards associated with a hazardous substance," and "statements of precautionary measures to follow." 16 C.F.R. § 1500.121(a)(1). "Labels that do not comply with this regulation may be considered misbranded." *Id.* Signal words include "DANGER," "WARNING," or "CAUTION." 16 C.F.R. § 1500.121(a)(2)(vi). Examples of statements of principal hazards given in the regulations included "HARMFUL OR FATAL IF SWALLOWED," "VAPOR HARMFUL," "FLAMMABLE," and "SKIN AND EYE IRRITANT." 16 C.F.R. § 1500.121(a)(2)(vii). Other cautionary material means all labeling requirements "required by the Act or issued under the Act." 16 C.F.R. § 1500.121(a)(2)(viii).

The principal hazard associated with mineral spirits is combustibility. The CPSC has specifically defined the word "combustible" as applicable to "any substance having a flash point at or above 100° F (37.8°C) to and including 150°F (65.6°C). . . ." 16 C.F.R. § 1500.3(c)(6)(b)(iii). The flash point of Parks' 100% mineral spirits tested at 101.3° F (38.5°C), placing the paint

thinner in the "combustible" category pursuant to the regulations. The Parks' paint thinner contains the warning "COMBUSTIBLE" in large face letters on the front of the can and thus satisfied the regulations's mandate of identifying the principal hazard associated with the product. (J.A. 1).

Under the terms of 16 C.F.R. § 1500.14, titled "Products requiring special labeling under Section 3(b) of the act," mineral spirits are classified as a hazardous substance requiring special labeling. *See* 16 C.R.F. § 1500.14(a)(3). The terms of 16 C.F.R. § 1500.14(b)(3)(ii) mandate that mineral spirits "shall be labeled with the signal word 'danger,' the statement or hazard 'Harmful or fatal if swallowed,' and the statement 'Call physician immediately.'" These warnings are all included in Parks' label, In additional to displaying the warning "COMBUSTIBLE," the front of Parks' can also states "DANGER." "HARMFUL OR FATAL IF SWALLOWED," and "See other cautions on back panel." (J.A. 1). The back of the can contains the warning "CAUTION" in large, bolded type. This is followed by the following specific warnings:

> If swallowed, do not induce vomiting. CALL PHYSICIAN IMMEDIATELY. Keep away from heat and open flame. Avoid prolonged contact with skin and breathing of vapor or spray mist. Do not transfer contents to unlabeled bottles or other containers. Close container after each use. Use only with adequate ventilation. KEEP OUT OF REACH OF CHILDREN.

Id. Thus, the paint thinner can recites the general warnings of 15 U.S.C. § 1261(p)(1) and all three of the specific warnings of 16 C.F.R. § 1500.14(b)(3)(ii).

The Court finds that Parks adequately complied with the regulations found in 15 U.S.C. § 1261(p)(1) and 16 C.F.R. § 1500 et seq. As to the Plaintiff's contention that 15 U.S.C. § 1261(p)(1)(F) required a more complete warning, such as "in order to use the product safely, it must never be used near an open flame," Appellant's Brief at 11, this Court disagrees that Congress intended courts and juries to displace the Secretary of the CPSC in filling in the interstices found in section 1261(p)(1)(F). Section 1261(p)(1)(F) implicates 15 U.S.C. § 1262(b) which only vests authority in the Secretary to promulgate "such reasonable variations or additional label requirements as he finds necessary for the protection of the public health and safety." For these reasons, the Court finds that Parks' 100% mineral spirits paint thinner was properly labeled in accordance with the applicable federal standards, and, therefore, the Plaintiff's claim of non-compliance must fail. Accordingly, since there is no genuine issue of material fact as to Parks' compliance with the federally mandated warnings, and counts I, II and III of the Plaintiff's complaint must be grounded upon the applicable federal statutes and regulations, the district court correctly granted summary judgment to Parks upon all five counts of the complaint.

III.

The judgment of the district court is therefore

AFFIRMED.

Appendix A

JUDGEMENT

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

NO. 91-1354
CA-90-2913-6

MELVIN MOSS

Plaintiff - Appellant

v.

PARKS CORPORATION

Defendant - Appellee

NO. 92-1475
CA-90-2913-6

MELVIN MOSS

Plaintiff - Appellant

v.

PARKS CORPORATION

Defendant - Appellee

Appeal from the United States District Court for the
District of South Carolina at Greenville

Appendix A

This case was heard by the Court on the record from the District Court and was argued by counsel.

The Court affirms the judgement of the District Court.

/s/ Bert S. Montague
CLERK

Appendix A

Filed: March 3, 1993

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 92-1354 (L)
(CA-90-2913-6)

Melvin Moss,

Plaintiff - Appellant,

versus

Parks Corporation,

Defendant - Appellee.

ORDER

The Court amends its opinion filed January 28, 1993, as follows:

On page 2, section 1, line 2 — the name "Currie" is correction to read "Courie."

For the Court - By Direction

/s/ Bert M. Montague
Clerk

Appendix A

Filed: April 6, 1993

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 92-1354(L)
(CA-90-2913-6)

Melvin Moss,

Plaintiff - Appellant,

versus

Parks Corporation,

Defendant - Appellee.

ORDER

The Court further amends its opinion filed January 28, 1993, and amended March 3, 1993:

On Page 6, line 3 of indented quotation — the word "prevent" is corrected to read "protect."

On page 6, line 7 of indented quotation — the word "protected" is corrected to read "protect."

For the Court - By Direction

/s/ Bert M. Montague
Clerk

Appendix B

APPENDIX B —ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA GRANTING SUMMARY JUDGMENT AND THAT COURT'S ORAL RULING FROM THE BENCH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

C.A.No.6:90-2913-20

Melvin Moss,

Plaintiff,

vs.

Parks Corporation

Defendant.

For the reasons stated on the record at the hearing March 2, 1992, it is hereby ORDERED that the defendant's motion for summary judgment is granted.

IT IS SO ORDERED.

/s/ Henry S. Herlong, Jr.
Henry M. Herlong, Jr.
United States District Judge

Greenville, South Carolina
March 2, 1992

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Case Number: C/A 6:90-2913-20

Melvin Moss,

Plaintiff,

v.

Parks Corporation,

Defendant

JUDGMENT IN A CIVIL CASE

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has its verdict.

_X_ Decision by Court. This action came to hearing before the Court. The issues having been heard and the Court having granted the defendant's motion for summary judgment,

IT IS ORDERED AND ADJUDGED

that summary judgment is hereby entered on behalf of of the defendant,

Parks Corporation.

Appendix B

March 3, 1992
Date

ANN A. BIRCH, CLERK
Clerk

/s/ Kathy Tisdale
(By) Deputy Clerk

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Civil Docket No. 6:90-2913-20

Greenville, South Carolina
March 2, 1992

Melvin Moss,

Plaintiff,

-vs-

Parks Corporation,

Defendant.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE HENRY M. HERLONG, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: JOSEPH A. MONNEYHAM, ESQ.
P.O. Box 6263
Greenville, SC 29606

For the Defendant YOLANDA C. COURIE
P.O. Box 12487
Columbia, SC 29211

Court Reporter: Stephanie Anderson
P.O. Box 10464
Greenville, SC 29603

Appendix B

* * * *

THE COURT: Well, the court finds and I so rule that the issue of summary judgment that's before the court at this time is an issue of law. The facts, which are undisputed, concerning the label is that the label, of course, is of appropriate size as required, and that the label does contain certain warnings, such as, "Keep away from heat and open flame. Avoid prolonged contact with skin and breathing of vapor or spray mist. Use only with adequate ventilation." And that the formatting of the label is appropriate. There is no issue as to that.

And there is no issue as to whether the — as I understand it — there is no issue as to whether the product was misbranded as far as the combustible aspect of it. The plaintiff relies upon the statute requiring precautionary measures describing the action to be followed or avoided. And the defendant relies to further reference to the regulations under 16 C.R.R. 1500 and subsequent sub-sections.

The court finds that the labeling requirements preempt any other causes of action and are controlling, and that the defendant has complied with the requirements of the regulations as they apply in this case, inasmuch as we are dealing with the mineral spirits requirements of the regulations.

The court finds that the regulations are controlling as the — as far as the requirements are concerned in this case, and that there is no issue of fact as to the defendant having complied with the regulations.

Therefore, the product in this particular case has been appropriately labeled because the product complies with the

regulations and, as a result, the defendant is entitled to summary judgment and I so rule. Thank you.

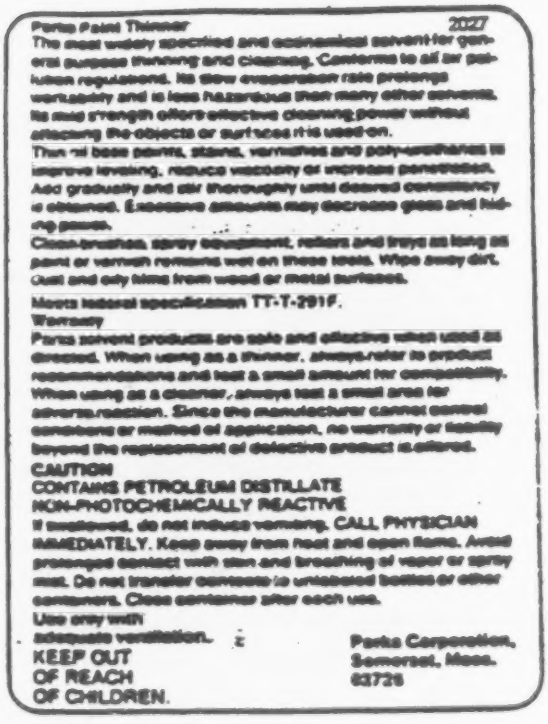
APPENDIX C —THE PARKS CORPORATION LABEL AT ISSUE IN THIS CASE

Label on the Front of the Can

BEST AVAI

Appendic C

Label on the Back of the Can



Parks Paint Thinner 2027

The most widely specified and economical solvent for general purpose thinning and cleaning. Conforms to all air pollution regulations. Its slow evaporation rate prolongs workability and is less hazardous than many other solvents. Its mild strength offers effective cleaning power without attacking the objects or surfaces it is used on.

Thin oil base paints, stains, varnishes and poly-urethanes to improve leveling, reduce viscosity or increase penetration. Add gradually and stir thoroughly until desired consistency is obtained. Excessive amounts may decrease gloss and hiding power.

Clean brushes, spray equipment, rollers and trays as long as paint or varnish remains wet on these tools. Wipe away dirt, dust and oily films from wood or metal surfaces.

Meets federal specification TT-T-291F.

Warranty

Parks solvent products are safe and effective when used as directed. When using as a thinner, always refer to product recommendations and test a small amount for compatibility. When using as a cleaner, always test a small area for adverse reaction. Since the manufacturer cannot control conditions or method of application, no warranty or liability beyond the replacement of defective product is offered.

CAUTION

CONTAINS PETROLEUM DISTILLATE

NON-PHOTOCHEMICALLY REACTIVE

If swallowed, do not induce vomiting. CALL PHYSICIAN IMMEDIATELY. Keep away from heat and open flame. Avoid prolonged contact with skin and breathing of vapor or spray mist. Do not transfer contents to unlabeled bottles or other containers. Close container after each use.

Use only with adequate ventilation.

KEEP OUT OF REACH OF CHILDREN.

Parks Corporation, Somerset, Mass. 02726

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APPENDIX D — SUMMARY OF STATE LAWS CONCERNING THE REGULATION OF LABELS ON HAZARDOUS SUBSTANCES

ARIZONA

ARIZ. REV. STAT. ANN. § 32-1901(53)(1992) defines poisons and hazardous substances to include hazardous substances covered by the federal act.[4] SECTION 32-1972(A) and (B) contain the same labeling requirements as the federal act. SECTION 32-1972(I) provides that the state board of pharmacy "shall cause the regulations promulgated under this section to conform, insofar as practicable, with the regulations established pursuant to the federal hazardous substances act." However, §32-1972(D) provides:

> If the board finds that the requirements of subsections A and B are not adequate for the protection of the public health and safety in view of the special hazard presented by any particular poison or hazardous substance, it may by regulation establish such reasonable variations or additional label requirements as it finds necessary, and any such poison or hazardous substance intended, or packaged in a form suitable, for use in the household or by children which fails to bear a

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4. Unless otherwise indicated, all references to the "federal act" mean the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261, et seq.

label in accordance with such regulations shall be deemed to be a misbranded poison or hazardous substance.

CALIFORNIA	CAL. HEALTH & SAFETY CODE § 28766 (West 1992) provides that hazardous substances labeled in accordance with the federal act are in compliance with the California Hazardous Substances Act.
COLORADO	COLO. REV. STAT. § 25-5-502(10) (1992) defines hazardous substances to include those covered by the federal act and § 25-5-402(15) provides for labeling requirements identical to those in the federal act. SECTION 25-5-508 provides that state Department of Health regulations "relating to the precautionary labeling or exemptions thereto shall not differ from the requirements of the 'Federal Hazardous Substances Act,' as amended, and the regulations promulgated pursuant thereto."
CONNECTICUT	CONN. GEN. STAT. § 21A-335(E) (1992) defines hazardous substances to include those in the federal act and §21A-335(O) provides for labeling requirements identical to those in the federal act. SECTION 21A-335(O)(1)(F) allows the state commissioner of Consumer Protection to modify by regulation the "precautionary measures describing the

action to be followed or avoided" that are required to be included on the label of a hazardous substance. SECTION 21A-342 authorizes the Commissioner to "promulgate such regulations as are required for the efficient enforcement of this chapter and shall cause such regulations to conform, insofar as is practicable, with the regulations established pursuant to the Federal Hazardous Substances Act."

FLORIDA

FLA. STAT. CH. 501.065(5) (1992) defines hazardous substances to include those covered by the federal act and CH. 501.065(15) provides for labeling requirements identical to the federal act, except that CH. 501.065(A)(6) authorizes the state Secretary of the Department of Health and Rehabilitative Services to modify by regulation the "precautionary measures describing the action to be followed or avoided" that are required to be included on the label of a hazardous substance. CH. 501.101(2) the department "to cause the regulations promulgated under §§ 501.061-501.121 to conform, insofar as practicable, with the regulations established pursuant to the federal hazardous substances act."

GEORGIA

Georgia law deals with the labeling of hazardous substances as part of a statute designed to provide public employees with

	protection from hazardous substances and with a right to know of the hazardous substances around which they are working. However, GA. CODE ANN. § 45-22-5(A)(4) (MICHIE 1992) exempts from all state labeling requirements hazardous substances as defined in the federal act.
HAWAII	HAW. REV. STATE § 330C-3(3)(A) (1992) defines hazardous substances to include those covered by the Federal Hazardous Substances Act. SECTION 330C-3(8) defines "Federal Act" to mean the Poison Prevention Packaging Act of 1970 (Public Law 91-601). SECTION 330C-6(C) provides: "The authority to adopt rules for the efficient enforcement of this chapter is vested in the director [of health]. The director may make such rules conform, insofar as practicable, with those promulgated under the federal act." No mention is made of the Federal Hazardous Substances Act.
ILLINOIS	ILL. REV. STAT. CH.35/16A (1992) provides that substances "which are in compliance with the Federal Hazardous Substances Act and the rules and regulations adopted pursuant thereto, and which are not in conflict with this Act and the rules and regulations adopted pursuant thereto, are in compliance with this Act." CH. 35/2-4 defines hazardous substance in accordance with the federal act.

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IOWA

IOWA CODE § 455F.1 (1992) defines hazardous substances to include substances covered by the federal act. Iowa's labeling requirements, however, are directed only to retailers. § 455F.3.

KENTUCKY

KY. REV. STAT. ANN. § 217.660(4) (MICHIE/BOBBS-MERRIL 1992) defines hazardous substances to include those covered by the federal act and § 217.670 includes labeling requirements identical to the federal act.

MAINE

ME. REV. STAT. ANN. TIT. 7, § 502(5) (West 1992) defines hazardous substances to include those covered by the federal act and § 507 provides for the same labeling requirements as the federal act. SECTION 504(3) provides that regulations promulgated under the Maine Act "shall conform so far as practicable to rules and regulations promulgated under authority of the Federal Act." SECTION 507(2) provides:

> [I]f the commissioner [of the state Department of Agriculture, Food and Rural Resources] finds that the requirements of this section are not adequate adeuate for the protection of the public health and safety in view of the special hazard presented by any particular hazardous substance, he may

by regulation establish such reasonable variations or additional label requirements as he finds necessary for the protection of the public health and safety; and any container of such hazardous substance, intended or suitable for household use, which fails to bear a label in accordance with such regulations shall be a misbranded package of a hazardous substance.

MARYLAND — MD. HEALTH-GEN. CODE ANN. § 22-501(A)(1) (1992) defines hazardous substances to include those covered by the federal act. With respect to labeling requirements, the Maryland law states, in § 22-503(2), that a hazardous substance is misbranded if it "[f]ails to meet the labeling requirements established by the rules and regulations adopted under this subtitle."

MASSACHUSETTS — MASS. GEN. L. CH. 94B, § 1 (1992) defines hazardous substances to include those covered by the federal act and provides for labeling requirements identical to the federal act, except that the state Commissioner of Public Health is authorized to modify by regulation the "precautionary measures describing the action to be followed or avoided" that are required to be included on the label of a hazardous substance.

MICHIGAN — MICH. COMP. LAWS 286.452(2)(D) (1992) defines hazardous substances to

include those covered by the federal act and § 286.452(2)(N) provides for labeling requirements identical to the federal act, except that the state Director of the Department of Agriculture is authorized modify by regulation the "precautionary measures describing the action to be followed or avoided" that are required to be included on the label of a hazardous substance (§286.452(2)(N)(I)(F)). SECTION 286.459(9)(2) provides, in part, that the director "shall cause any additional rules or amendments to rules promulgated to conform, insofar as practicable, with the regulations established pursuant to the federal hazardous substances act, 15 U.S.C. 1261 to 1275, and to the consumer product safety act, 15 U.S.C. 2051 to 2082."

MINNESOTA — MINN. STAT § 24.33(D) (1992) defines hazardous substances to include those covered by the federal act and § 24.33 (M) contains labeling requirements identical to the federal act.

MONTANA — MONT. CODE ANN. § 50-30-201(1) (1992) defines of hazardous substances to include those covered by the federal act and contains and § 50-3-202(1) contains labeling requirements identical to the federal act, except that § 50-30-202(1)(A)(VI) authorizes the state Department of Health and Environmental

Appendix D

Services to modify by regulation the "precautionary measures describing the action to be followed or avoided" that are required to be included on the label of a hazardous substance. SECTION 50-3-103 authorizes the department to adopt by reference without public hearing rules adopted under the federal act. SECTION 50-30-216, however, provides:

> If the department finds that the requirements of 50-30-202(1)(A) are not adequate for the protection of the public health and safety in view of the special hazard presented by a hazardous substance, the department may by rule establish such reasonable variations or additional labeling requirements as are necessary for the protection of the public health and safety, and a hazardous substance intended or packaged in a form suitable for use by the general public or by children which fails to bear a label in accordance with the rules is a misbranded hazardous substance.

NEW HAMPSHIRE N.H. REV. STAT. ANN § 339:A:2(II)(1991) defines hazardous substances to include those covered by the federal act and, in § 339-A:3, provides for labeling requirements identical to the federal act, except that § 339-A:3(I)(F)

	authorizes the state Director of the Division of Public Health Service to modify by regulation the "precautionary measures describing the action to be followed or avoided" that are required to be included on the label of hazardous substance.
NEW JERSEY	N.J. REV. STAT. § 24:5A-4 (1992) exempts any hazardous substance subject to and conforming with the federal act for state regulatory requirements.
NORTH CAROLINA	N.C. GEN STATE § 66-88 (1992) exempts any hazardous substance subject to and conforming with the federal act from state regulatory requirements.
NORTH DAKOTA	N.D. CENT. CODE § 19-21-01(5) (1985) defines hazardous substances to include those covered by the federal act and § 19-21-01(10) provides for the same labeling requirement as the federal act. SECTION 19-21-05 provides that the state Department of Health "shall cause the regulations adopted under this chapter to conform with the regulations established pursuant to the federal Hazardous Substances Act."
OHIO	OHIO REV. CODE ANN. § 3716.01(D) (1991) defines hazardous substances to include those covered by the federal act and § 3716.01(N) provides for labeling requirements identical to those in the federal act.

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OKLAHOMA — OKLA. STAT. TIT. 63, § 1-1601(A) (1992) defines hazardous substances to include those covered by the federal act and § 1-1601(K) provides for labeling requirements identical to the federal act. SECTION 1-16019(K)(1)(F) allows the state Board of Health to modify by regulation the "precautionary measures describing the action to be followed or avoided" that are required to be included on the label of a hazardous substance.

OREGON — OR. REV. STAT. § 453.005(7)(A) (1991) defines hazardous substance to include those covered by the federal act and § 453.035 contains labeling requirements identical to the federal act. SECTION 453.095 provides:

> (2) The Assistant Director for Health shall cause the rules adopted under ORS 453.005 to 453.135 and 453.990 (2) to be no less strict than rules established pursuant to the Federal Hazardous Substances Act.

RHODE ISLAND — R.I. GEN LAWS § 23-24-2(5)(1989) defines hazardous substances to include those covered by the federal act and § 23-24-2(13) provides for labeling requirements identical to the federal act, except that § 23-24-2(15)(A)(VI) allows the Rhode Island consumers' council to

	modify by regulation the "precautionary measures describing the action to be followed or avoided" that are required to be included on the label of a hazardous substance.
SOUTH CAROLINA	South Carolina's Hazardous Substances Act provides that the regulations promulgated under the Act shall "conform with the regulations established pursuant to the Federal Hazardous Substance Act." S.C. CODE ANN. § 23-39-90 (LAW. CO-OP. 1991).
TENNESSEE	TENN. CODE ANN. § 68-131-102(9)(A) (1992) defines hazardous substances to include those covered by the federal act and § 68-131-102(15) provides for labeling requirements identical to the federal act, except that § 68-131-102(15)(A)(VI) authorizes the state Commissioner of Agriculture to modify by regulation the "precautionary measures describing the action to be followed or avoided" that are required to be included on the label of a hazardous substance. SECTION 68-131-109 provides, in part, that the state Commissioner of Agriculture "shall cause the regulations promulgated . . . to conform (insofar as practicable) with the regulations established pursuant to the Federal Hazardous Substances Act (compiled in 15 U.S.C. § 1261 et seq.)"

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TEXAS	The Texas law requires that rules adopted to control and label hazardous substances "must conform with regulations adopted under the Federal Hazardous Substances Act (15 U.S.C. Section 1261 et seq.) as applicable." TEX. HEALTH & SAFETY CODE § 501.025 (1992).
VERMONT	VT. STAT. ANN TIT. 18, § 4051(H) (1991) defines hazardous substances to include those covered by the federal act and § 4051 (Q) provides for the same labeling requirements as the federal act.
WASHINGTON	Washington law requires that rules adopted to control and label hazardous substances must conform with the "requirements or exemptions of the Federal Hazardous Substances Act and with the regulations or interpretations promulgated pursuant thereto." WASH. REV. CODE § 70.106.100(5) (1992).
WISCONSIN	WIS. STAT. § 100.37(1)(C) (1991) defines hazardous substances to include those covered by the federal act and § 100.37(1)(H) provides for labeling requirements identical to the federal act, except that § 100.37(1)(H)(1) authorizes the Department of Agriculture, Trade and Consumer Protection to modify by regulation the "precautionary measures describing the action to be followed or

avoided" that are required to be included on the label of a hazardous substance. SECTION 100.37(2)(B) provides:

> If the department finds that the requirements of this section are not adequate for the protection of the public health and safety in view of the special hazards presented by any particular hazardous substance, it may by rule establish such reasonable variations or additional requirements as it finds necessary for the protection of the public health and safety.

In addition, SECTION 100.37(2)(G) provides:

> The department may by rule prescribe safety standards, including type of package material and safety closures for hazardous substances and pesticides, and may prohibit the sale of noncomplying or defective packages.

APPENDIX E — CITATION TO OPINIONS ALLOWING RECOVERY IN NEGILGENCE OR STRICT LIABILITY FOR FAILURE TO WARN ABOUT DANGERS ASSOCIATED WITH USING A PRODUCT

Alabama:	*Clark Indusustries, Inc. v. Home Indemnity Co.*, 591 So. 2d 458 (Ala. 1991).
Alaska:	*Shanks v. Upjohn Co.*, 835 P.2d 1189 (Alaska 1992).
Arizona:	*Gosewisch v. American Honda Motor Co.*, 737 P.2d 376 (Ariz. 1987).
Arkansas:	*W.M. Bashlin Co. v. Smith*, 643 S.W.2d 526 (Ark. 1983).
California:	*Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549 (Cal. 1991).
Colorado:	*Halter v. Waco Scaffolding & Equipment Co.*, 797 P.2d 790 (Colo.App), cert. denied (1990).
Connecticut:	Conn. Gen. Stat. § 52-5472Q(A) (1992).
Delaware:	*Wilhelm v. Globe Solvent Co.*, 373 A.2d 218, 223 (Del. Super. Ct. 1977), aff'd in pertinent part, rev'd in part, 411 A.2d 611 (Del. Super. Ct. 1979).
D.C.:	*East Penn Mfg. Co. v. Pineda*, 578 A.2d 1113 (D.C. 1990).
Florida:	*High v. Westinghouse Electric Corp.*, 610 So. 2d 1259 (Fla. 1992).

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Georgia:	*Pepper v. Selig Chemical Industries*, 288 S.E. 2d 693 (Ga. App. 1982).
Hawaii:	*Ontai v. Straub Clinic and Hospital*, 659 P.2d 734 (Haw. 1983).
Idaho:	*Mico Mobile Sales & Leasing, Inc. v. Skyline Corp.*, 546 P.2d 54 (Idaho 1975).
Illinois:	*Palmer v. Avco Distributing Corp.*, 412 N.E. 2d 959 (Ill. 1980).
Indiana:	*Underly v. Advance Machine Co.*, 605 N.E. 2d 1186 (Ind.App. 1993).
Iowa:	*Lakatosh v. Diamond Alkali Co.*, 208 N.W. 2d 910 (Iowa 1973).
Kansas:	*Savina v. Sterling Drug., Inc.*, 795 P.2d 915 (Kan. 1990).
Kentucky:	*Post v. American Cleaning Equip. Corp.*, 437 S.W. 2d 516 (Ky. 1969).
Louisiana:	*Sharkey v. Sterling Drug, Inc.*, 600 So.2d 701 (La.App.), *writ denied*, 605 So.2d 1099 (La. 1992).
Maine:	*Bernier v. Raymark Industries*, 516 A.2d 534 (Me. 1986).
Maryland:	*Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633 (Md. 1992).

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Massachusetts:	*Mitchell v. Sky Climber, Inc.*, 487 N.E. 2d 1374 (Mass. 1986).
Michigan:	*Coy v. Richard's Industries*, 428 N.W.2d 734 (Mich.App. 1988).
Minnesota:	*Westbrock v. Marshalltown Mfg. Co.*, 473 N.W.2d 352 (Minn.App. 1991).
Mississippi:	*Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).
Missouri:	*Magnuson ex rel. Mabe v. Kelsey-Hayes Co.*, 844 S.W.2d 448 (Mo.App. 1992).
Montana:	*Streich v. Hilton-Davis*, 692 P.2d 440 (Mont. 1984).
Nebraska:	*Libby-Owens Ford Glass Co. v. L & M Paper Co.*, 205 N.W. 2d 523 (Neb. 1973).
Nevada:	*Fyssakis v. Knight Equipment Corp.*, 826 P.2d 570 (Nev. 1992).
New Hampshire:	*Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843 (N.H. 1978).
New Jersey:	*Feldman v. Lederle Laboratories*, 592 A.2d 1176 (N.J. 1991), *cert. denied*, 112 S. Ct. 3027 (1992).

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New Mexico:	*Eichel v. Goode, Inc.*, 680 P.2d 627 (N.M.App. 1984).
New York:	*Bukowski v. Coopervision, Inc.*, 592 N.Y.S.2d 807 (N.Y. App.Div. 1993).
North Carolina:	*Davis v. Siloo Inc.*, 267 S.E.2d 354 (N.C.App. 1980).
North Dakota:	*Oanes v. Westgo, Inc.*, 476 N.W.2d 248 (N.D. 1991).
Ohio:	*Crislip v. TCH Liquidating Co.*, 556 N.E.2d 1177 (Ohio 1990).
Oklahoma:	*Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377 (Okla. 1974).
Oregon:	*Wood v. Ford Motor Co.*, 691 P.2d 495 (Or.App. 1984).
Pennsylvania:	*Jordon ex rel. Jordon v. K-mart Corp.*, 611 A.2d 1328 (Pa. Super. Ct. 1992).
Rhode Island:	*Thomas v. Amway Corp.*, 488 A.2d 716 (R.I. 1985).
South Carolina:	*Liningston v. Noland Corp.*, 362 S.E.2d 16 (S.C.1987).
South Dakota:	*Peterson v. Safway Steel Scaffolds Co.*, 400 N.W. 2d 909 (S.D. 1987).

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Tennessee:	*Goode v. Tamko Asphalt Products, Inc.*, 783 S.W. 2d 1984 (Tenn. 1990).
Texas:	*Keene Corp. v. Gardner*, 837 S.W. 2d 224 (Tex. App. 1992).
Utah:	*Grundberg v. Upjohn Co.*, 813 P.2d 89 (Utah 1991).
Vermont:	*Ostrowski v. Hydra-Tool Corp.*, 479 A.2d 126 (Vt. 1984).
Virginia:	*Featherall v. Firestonre Tire & Rubber Co.*, 252 S.E.2d 358 (Va. 1979).
Washington:	*Haysom v. Coleman Lantern Co.*, 573 P.2d 785, (Wash. 1978).
West Virginia:	*Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603 (W.Va. 1983).
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No. 92-1736

In The

Supreme Court of the United States

October Term, 1992

MELVIN MOSS,

Petitioner,

vs.

PARKS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED FOR REVIEW

Whether the Federal Hazardous Substances Act, 15 U.S.C. §1261, *et seq.*, and its corresponding regulations, 16 C.F.R. Part 1500, *et seq.*, pre-empt personal injury claims based on an alleged failure to include a warning on a product label, where the label's warnings comply with the requirements of the Federal Hazardous Substances Act and its regulations.

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

Respondent, Parks Corporation (Parks), respectfully requests that petitioner's request for a writ of certiorari to the Fourth Circuit Court of Appeals be denied.

OPINIONS BELOW

The order of the District Court of South Carolina (petitioner's appendix 20a-25a) is not officially reported. The opinion of the Fourth Circuit Court of Appeals (petitioner's appendix 1a-15a) is reported at 985 F.2d 736 (4th Cir. 1993).

JURISDICTION

Contrary to petitioner's assertion, this Court does not have jurisdiction to entertain the writ pursuant to 28 U.S.C. § 1257. Instead, jurisdiction for the review of this case is based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

15 U.S.C. § 1262(b) "Declaration of hazardous substances" provides:

> If the Commission finds that the requirements of section 1261(p)(1) of this title are not adequate for the protection of the public health and safety in view of the special hazard presented by any particular hazardous substance, it may by regulation establish such reasonable variations or additional label requirements as it finds necessary for the protection of the public health and safety; and any such hazardous substance intended, or packaged in a form suitable, for use in the household or by children, which fails to bear a label in accordance with such regulations, shall be deemed a misbranded hazardous substance.

16 C.F.R. § 1500.3(c)(6)(iii) "Definitions" provides:

> The term *combustible* shall apply to any substance having a flashpoint at or above 100°F (37.8°C) to and including 150°F (65.6°C) as determined by the test method described at § 1500.43a, . . .

16 C.F.R. § 1500.14 "Products requiring special labeling under section 3(b) of the act" provides:

> (a) Human experience, as reported in the scientific literature and to the Poison Control Centers and the National Clearing House for Poison Control Centers, and opinions of informed medical experts establish that the following substances are hazardous:
>
> * * *
>
> (3) Products containing 5 percent or more by weight of benzene (also known as benzol) and products containing 10 percent or more by weight of toluene (also known as toluol), xylene (also known as xylol), or petroleum distillates such as kerosene, mineral seal oil, naphtha, gasoline, mineral spirits, stoddard solvent, and related petroleum distillates.
>
> (b)(3)(ii) Because products containing 10 percent or more by weight of toluene, xylene, or any of the other substances listed in paragraph (a)(3) of this section may be aspirated into the lungs, with resulting chemical pneumonitis, pneumonia, and pulmonary edema, such products shall be labeled with the signal word "danger", the statement or hazard "Harmful or fatal if swallowed," and the statement "Call physician immediately."

16 C.F.R. § 1500.121 "Labeling requirements" provides:

> (a)(1) *Background and scope.* Section 2(p)(1) of the Federal Hazardous Substances Act (FHSA) or "the Act"), 15 U.S.C. 1261(p)(1), requires that hazardous substances bear certain cautionary statements on their labels. These statements

include: signal words; affirmative statements of the principal hazard(s) associated with a hazardous substance; the common or usual name, or chemical name, of the hazardous substance; the name and place of business of the manufacturer, packer, distributor, or seller; statements of precautionary measures to follow; instructions, when appropriate, for special handling and storage; the statement "Keep out of the reach of children" or its practical equivalent; and when appropriate, first aid instructions.

(a)(2)(vii) *Statement of principal hazard(s)* means that wording descriptive of the principal or primary hazards associated with a hazardous substance required by section 2(p)(1)(E) of the Act. Some examples of such statements are "HARMFUL OR FATAL IF SWALLOWED," "VAPOR HARMFUL," "FLAMMABLE," and "SKIN AND EYE IRRITANT."

STATEMENT OF THE CASE

Statement of Facts

Pursuant to Supreme Court Rule 15.1, Parks takes issue with petitioner's statement of the case. On March 16, 1989, petitioner was injured while allegedly using Parks 100% mineral spirits to clean paint spills in the bedroom of his rented residence. Prior to using the Parks product, petitioner read the labeling on the front and the back of the plastic bottle of mineral spirits. *Moss v. Parks Corporation*, 985 F.2d 736, 737 (4th Cir. 1993). The label (petitioner's appendix at 26a-27a) contains warning language including, among other information, the words

"DANGER!", "COMBUSTIBLE", "KEEP AWAY FROM HEAT AND OPEN FLAME", and "USE ONLY WITH ADEQUATE VENTILATION". After reading the label, petitioner poured two pints of the mineral spirits on the floor and began scrubbing to remove what he called paint "overspray." Under petitioner's theory, the scrubbing created a mist which wafted across the room, over a hallway outside the room and into another room.

While there was allegedly a kerosene heater in the room across the hall, petitioner testified that the heater was off while he was painting and cleaning. After Moss began scrubbing, a flash fire occurred which caused his injuries. The fire caused localized damage to the room petitioner painted. No explosion occurred. Petitioner's theory of the fire is the "pilot light" of the kerosene heater ignited the mineral spirits.

Proceedings in the District Court and Fourth Circuit

Petitioner filed suit in December, 1990 alleging a single cause of action for failure to warn. Parks answered and later moved for summary judgment in October, 1991. Petitioner then amended his Complaint alleging five causes of action based on failure to warn. He claimed Parks' label was misbranded because it failed to comply with the labeling requirements of the Federal Hazardous Substance Act, 15 U.S.C. § 1261, *et seq.* (hereinafter "FHSA").

On February 24, 1992, Parks renewed its motion for summary judgment as to petitioner's claim. Parks argued petitioner's failure to warn claim was pre-empted by the FHSA. At the hearing on the motion, the District Court found the warning on the Parks' bottle complied with the

FHSA and the regulations promulgated thereunder, and the FHSA pre-empted all causes of action based on a failure to warn. On March 3, 1992 the District Court entered summary judgment in favor of Parks.

Petitioner appealed the District Court's dismissal of his case by filing a notice of appeal on March 17, 1992. The Fourth Circuit Court of Appeals issued a ruling on January 28, 1993. The court held the paint thinner was properly labeled in accordance with the applicable federal standards. In coming to this conclusion, the Court found that where a plaintiff seeks a labeling requirement more stringent than those in the FHSA, his action is pre-empted. The Court further found the Parks' warning complied with the requirements of the FHSA. The Court rejected the argument that a *jury* should be allowed to determine the adequacy of precautionary labeling already addressed in detail by the FHSA and its corresponding regulations. Accordingly, the Court affirmed judgment in favor of Parks. *See, Moss v. Parks Corporation*, 985 F.2d 736 (4th Cir. 1993). Petitioner did not move for rehearing or rehearing *en banc* of the holding. Petitioner filed this petition on April 28, 1993 and Parks' counsel received it on April 30, 1993.

SUMMARY OF ARGUMENT

This Court should decline to grant the petition for four fundamental reasons. While, on the surface, it appears there is a conflict among the Second, Fourth, and Ninth Circuits regarding the pre-emptive nature of the

FHSA, an analysis of the facts of the cases cited by petitioner from the Second and Ninth Circuits reveals there is no conflict. Instead, *Moss v. Parks Corporation* provides a clear and reasoned interpretation of the pre-emptive nature of the FHSA in the context of a state law tort claim for inadequate labeling. The two cases cited by petitioner do not deal with tort claims or inadequate labeling under the terms of the FHSA.

In holding the FHSA pre-empts state law tort claims where the manufacturer has complied with federal labeling requirements, the Court of Appeals in *Moss* relied on this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992). Contrary to the assertions of the petitioner, there is no widespread confusion among the appellate courts regarding the interpretation of the decision in *Cipollone*. Since that ruling, there have been a number of well-reasoned decisions applying the rule of *Cipollone* finding that state law tort claims are pre-empted.

As part of the holding in *Moss*, the Court of Appeals found the mineral spirits product was properly labeled under the terms of the FHSA. *See, Moss*, 985 F.2d at 742. The petitioner's Complaint and subsequent appeal challenge the adequacy of the labeling developed by the Consumer Product Safety Commission ("CPSC") through research and testing. Despite the finding of the court and the clear language of the statute, petitioner claims the labeling is "meager and inadequate" (petitioner's brief at 21 and 24.) Because petitioner is challenging the adequacy of the labeling, his claim falls squarely within the FHSA's regulatory scope and pre-emptive field. The Fourth Circuit found claims such as petitioner's would directly conflict with the regulatory requirements of

FHSA and violate the legislative intent in the preemptive provision, 15 U.S.C. § 1261, note (b)(1)(A). It was intended that state law labeling requirements must be "identical" to the requirements of the federal law, in order to provide uniformity throughout the nation. The holding in *Moss* does not prevent a state from enacting a statute or administrative regulation which is identical to that contained in the FHSA.

Finally, there is no reason for the Court to consider petitioner's claims regarding the Fourth Circuit decision's effect on state hazardous substances statutes. The Fourth Circuit was faced with the uncertainty of a state common law jury verdict, not the specificity of a state statute. The facts of petitioner's case do not call upon the Court to analyze any of the individual state statutes in order to properly rule on this case. Finally, because each state statute differs in its breadth and scope, this case would not present an adequate forum in which to specifically address each of the statutes.

ARGUMENT

I. THERE IS NO CONFLICT OF AUTHORITY AMONG THE CIRCUIT COURTS OF APPEAL.

The FHSA pre-emption of state law tort claims for inadequate labeling has not created a widespread controversy among appellate courts. Nevertheless, petitioner claims a conflict exists among the federal circuits based on two cases that focus on other aspects of the FHSA. Each of the cases cited by petitioner deal not with a state common law claim for inadequate labeling but, instead,

address a challenge to a state statute requiring warnings in a different context than that presented by petitioner's claim.

In *Chemical Specialties Manufacturers Association v. Allenby*, 958 F.2d 941 (9th Cir. 1992), cert. denied, 113 S.Ct. 80 (1992), the Ninth Circuit took up a trade association's challenge to California's point of sale warnings. When California adopted its Safe Drinking Water and Toxic Enforcement Act (Proposition 65), the law required certain substances must provide warnings to the public regarding the health risks of the product. The issue in *Allenby* was whether a point of sale warning is labeling subject to the pre-emptive provisions of the FHSA. The *Allenby* court analyzed whether the point of sale warnings were "cautionary labeling". The issue under consideration had nothing to do with labels on products. The Ninth Circuit held "that the term 'labeling' does not apply to the point of sale signs required under Proposition 65." *Id.* at 946. Since the point-of-sale warnings were not labeling on the product, the Ninth Circuit concluded the pre-emption provisions of the FHSA did not apply.

While no pre-emption was found under that set of facts, the Ninth Circuit recognized the pre-emptive scope of the FHSA labeling requirements. The court, agreeing with the manufacturers association, recognized the FHSA "expressly pre-empts all state mandated precautionary labeling that is not identical to that required by the Act." *Id.* at 949. Under this rationale, there is no conflict between the decision in *Moss* and the holding in *Allenby*

as to precautionary labeling. The Ninth Circuit also recognized the purpose of the pre-emption provision of the FHSA:

> The preemption clause in FHSA balances these competing concerns by leaving cautionary labeling requirements to the federal government while allowing states to regulate the *sale* and *use* of hazardous chemicals. Proposition 65 warnings do not constitute cautionary labeling preempted by FHSA.

Allenby, 958 F.2d at 650. (Emphasis added). The conclusions of the Ninth Circuit relating to labeling demonstrate there is no conflict between the circuits as to the preemptive scope of the FHSA.

Petitioner also relies on *Toy Manufacturers of America, Inc. v. Blumenthal,* 986 F.2d 615 (2d Cir. 1993). The issue turned on whether or not the FHSA regulated the hazard which was the subject of the Connecticut warning. At issue was a "small parts" warning for toys intended for children between the ages of three and seven and whether or not the Connecticut law was pre-empted by the FHSA. A close reading of *Blumenthal* finds there was no corresponding federal regulation which pre-empted the warning mandated by state law. The court held "preemption obtains only where a state action regulates the same 'hazardous substance' and the same 'risk of illness or injury associated with [that] hazardous substance' which a FHSA regulation regulates." *Id.* at 618. After reviewing the legislative history and the FHSA regulations adopted regarding toys, the court concluded

that there was no explicit federal regulation of the hazard. Further, the court found the decision not to regulate did not evidence a pre-emptive intent "to shut out state action". *Id.* at 623. As a result, Connecticut was free to require the warning on the toys because the federal government had not mandated a warning.

Unlike *Allenby* and *Blumenthal, Moss* dealt squarely with a product label in which the warning language was specified by the FHSA regulatory scheme for mineral spirits. Unlike *Allenby,* the Parks warning was found on the product and was "cautionary labeling". The language and warning at issue, unlike *Blumenthal,* were specifically addressed in the provisions of the Consumer Product Safety Act which specify the warning language.

Thus, while on their face *Allenby* and *Blumenthal* create a split of authority among the three federal circuits, a close reading of the facts indicates that each case is factually distinct. Further, the holdings in each case reaffirmed the principles which formed the basis for the Fourth Circuits' decision in *Moss.* There is no conflict for this Court to resolve.

II. THE FOURTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE REGULATORY SCHEME OF THE FHSA TO THE PARKS MINERAL SPIRITS LABEL.

In his statement of the case, petitioner analyzes the FHSA, the legislative history, and the corresponding regulations and concludes that a portion of the labeling requirements are "largely dependent upon the soundness of the seller's judgment in deciding what to explain and

how to explain it". (petitioner's brief at p. 11). In coming to this conclusion, the petitioner does not point to any authority in support of his position that Parks misbranded the product. A simple application of the labeling requirements found at 15 U.S.C. § 1261 *et seq.* and 16 C.F.R., part 1500, to the mineral spirits product demonstrates that the product was properly labeled.

The FHSA was enacted in 1960. The express purpose of the law was to "provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce and are intended or suitable for household use." House Comm. on Interstate and Foreign Commerce, Federal Hazardous Substances Labeling Act, H.R. Rep. No. 1861, 86th Cong., 2d Sess. 2 (1960), reprinted in 1960 U.S.C.C.A.N. 2833. In the 1966 amendments to the Act, a limited pre-emption provision was added which preempted state labeling requirements "unless such cautionary labeling requirement is identical to the labeling requirement under 2(p) or 3(b)." 15 U.S.C. § 1261, Note (b)(1)(A).

Petitioner alleges the mineral spirits label fails to comply with 15 U.S.C. § 1261(p)(1)(F). Under this provision, a product must contain "precautionary measures describing the action to be followed or avoided, except when modified by regulation of the Secretary pursuant to section 1262 of this title." Section 1262 gives the Secretary of the Consumer Product Safety Commission the discretion to require additional labeling for the protection of public health and safety. Nowhere in 15 U.S.C. § 1262 is the authority to impose additional labeling requirements granted to the states or to the courts.

Labeling requirements for mineral spirits are found at 16 C.F.R. Part 1500. The regulations require the ". . . hazardous substance bear certain cautionary statements on their labels." These statements include " . . . affirmative statements of the principal hazards . . . " 16 C.F.R.§ 1500.121(a)(1). The principal hazard associated with mineral spirits is combustibility. 15 U.S.C. § 1261(p)(1)(E). The CPSC specifically defines the word "combustible" as applicable to "any substance having a flashpoint at or above 100°F (37.8°C) to and including 150°F (65.6°C) as determined by the test method described at § 1500.43(a). . . . " 16 C.F.R. § 1500.3(c)(6)(b)(iii). The flashpoint of the Parks 100% mineral spirits tested at 101.3°F (38.5°C), placing the mineral spirits in the "combustible" category pursuant to the regulations. In conjunction with this hazard, the Parks label also warns the user to "Keep away from heat and open flame" and "use only with adequate ventilation."

Under the terms of 16 C.F.R. § 1500.14, titled "Products Requiring Special Labeling Under Section 3(b) of the Act", mineral spirits are a hazardous substance which require special labeling. 16 C.F.R. § 1500.14(a)(3). The terms of subsection 1500.14(b)(3)(ii) dictate mineral spirits be labeled "with the signal word 'Danger', the statement or hazard, 'Harmful or fatal if swallowed,' and the statement 'Call physician immediately.' " These warnings, along with 15 U.S.C. § 1261(p), form the sum of required labeling for Parks mineral spirits. Petitioner has conceded Parks complied with each of these requirements under the FHSA. Nevertheless, petitioner alleges these required warnings are ambiguous and the label, drafted in accordance with federal law, is inadequate.

Under petitioner's theory, the label is deficient because it fails to adequately describe or set forth the "precautionary measures to be followed or avoided." This claim is made despite the warning "Keep away from heat and open flame," which is the hazard that allegedly caused petitioner's injuries. However, petitioner alleges the warnings should have included a reference to the scenario that he alleges occurred here, namely, the mist of the product catching fire. This ignores the breadth and scope of the federal law. The CPSC has the power, authority and duty to conduct testing and research to enable it to promulgate regulations. Labeling requirements are enacted based on the results of the testing and research. To allow a jury to conclude more or different warnings should be placed on a product label would defeat the purpose of FHSA. And, to apply a new standard in retrospect would be unfair to labelers who abide by the law and regulations they are bound to follow.

The Fourth Circuit correctly concluded where manufacturers, such as Parks, complied with federally mandated labeling requirements, the FHSA pre-empts any claim requiring more stringent labeling requirements. These labeling requirements are characterized by the petitioner as "ambiguous" and Parks' compliance is characterized as "meager and inadequate". (Petitioner's brief at pp. 21 and 24.) Petitioner's statements, standing alone do not create sufficient grounds for the Court to hear this case.

III. THERE IS NO POST *CIPOLLONE V. LIGGETT GROUP, INC.* STRUGGLE WITH THE PRINCIPLES OF PRE-EMPTION.

Petitioner maintains "lower courts have continued to struggle with pre-emption claims since this Court decided *Cipollone v. Liggett Group, Inc.*" (petitioner's brief at 18). In *Cipollone*, this Court reaffirmed three key principles related to the doctrine of pre-emption. The first is "the purpose of Congress is the ultimate touchstone." 112 S.Ct. at 2617, 2631. The *Cipollone* decision also held the terms "state law" or "state requirement" encompass not only statutes and regulations, but also common law jury verdicts. 112 S.Ct. at 2620. The Court recently reaffirmed its holding in *CSX Transportation, Inc. v. Easterwood*, 61 U.S.L.W. 4346 (U.S. April 20, 1993), citing *Cipollone* and stating a " . . . federal statute barring additional 'requirement[s] . . . imposed under state law' pre-empts common-law claims." *Id.* at 4347. *Easterwood* also held in the context of federal railroad regulation that "applicable federal regulations may pre-empt any state law, rule, regulation, order, or standard relating to railroad safety. Legal duties imposed on railroads by the common law fall within the scope of these broad phrases." *Id.* The final principle reaffirmed by *Cipollone* is that state "requirements" in conflict with federal law can have a regulatory effect. See, *Cipollone*, 112 S.Ct. at 2629, 2634.

Since this court's decision in *Cipollone*, lower courts have had a number of opportunities to re-examine the pre-emption doctrine with the guidance from this Court. As petitioner recognizes, this Court ordered two circuits to re-examine their holdings that the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135, *et seq.*

(hereinafter "FIFRA") pre-empted common law tort actions in light of the *Cipollone* holding. On remand, both circuits affirmed their earlier rulings that state common law warning claims were pre-empted by the terms of FIFRA. *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *cert. granted and judgment vacated*, 112 S.Ct. 3020 *on remand*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers*, 959 F.2d 158 (10th Cir. 1992), *cert. granted and judgment vacated sub nom, Arkansas-Platte & Gulf Partnership v. Dow Chemical*, 113 S.Ct. 314 (1993); *on remand*, 981 F.2d 1177 (10th Cir. 1993). These decisions are important in that the statutory and regulatory scheme of FHSA and FIFRA are similar. *Moss v. Parks Corporation*, 985 F.2d at 739.

In both *Arkansas-Platte* and *Papas*, circuit courts of appeal applied the decision in *Cipollone* and found common law failure to warn actions were pre-empted. The *Arkansas-Platte* Court found its first decision was "re-enforced" by *Cipollone*. 981 F.2d at 1179. More importantly, the Tenth Circuit reasoned:

> The common law standard is generic. In contrast, the FIFRA warning is prospective and specific. To the extent that state tort claims in this case require a showing that defendants' labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA, they would be expressly preempted.

Arkansas-Platte & Gulf Partnership v. Dow Chemical, 981 F.2d at 1179. The Eleventh Circuit in *Papas* also reaffirmed its initial finding of FIFRA pre-emption after *Cipollone*. The claims of failure to warn in *Papas* were addressed:

> Those allegations, like the failure to warn claims in *Cipollone*, require the finder of fact to determine whether, under state law, Zoecon adequately labelled and packaged its product. This inquiry is precisely what section 136v forbids. FIFRA denies states the authority to require that pesticide manufacturers conform to state law standard of care in their labelling and packaging practices. Thus, to the extent that the Papases' claims require a showing that Zoecon's labelling or packaging 'should have included additional, or more clearly stated warning, those claims are pre-empted.'

Papas, 985 F.2d at 518. (Citations omitted). The application of *Cipollone* in these cases is not a source of confusion and the holdings are applicable to this case.

Even though *Cipollone* has been applied on several occasions without confusion, and this Court has since relied on it in *Easterwood*, petitioner attempts to create an issue where no issue exists. In order to do so, he cites to the District Court opinion in *Montana Pole & Treating Plant v. I.F. Laucks*, 775 F.Supp. 1339 (D.Mont. 1991). There, the District Court held FIFRA did not pre-empt state common law warning claims. While this case is currently pending before the Ninth Circuit, the District Court opinion was redered prior to *Cipollone*. The *Cipollone* case resolves many of the pre-emption issues facing the District Court. Further, the decisions in *Allenby* and *Blumenthal* do not, by virtue of their subject matter, suggest a confusion exists in the lower courts. There is no reason for the Court to re-visit the issue.

IV. THE OPINION OF THE FOURTH CIRCUIT DOES NOT INVALIDATE ANY STATE STATUTE OR REQUIRE AN ANALYSIS OF ITS EFFECT ON STATE HAZARDOUS SUBSTANCE STATUTES.

As an additional reason for granting his petition, petitioner argues the Fourth Circuit opinion would invalidate a number of state hazardous substances act statutes. In support of this contention, he cites a number of state statutes modeled after the FHSA. He contends *Moss* undermines the effect of the statutes. Petitioner is correct to the extent he states those statutes demanding some labeling requirement not identical to federal law requirements are pre-empted. This is clear not only from the language of the FHSA, but also from the holdings of *Allenby* and *Blumenthal,* relied on by the petitioner.

An examination of many of the statutes cited by petitioner reveals the extent to which they may regulate hazardous substances. For example, New Jersey Revised Statute 24:5A-4 "Application of Federal Hazardous Substances Labeling Act" provides:

> No hazardous substance subject to and conforming with the Federal Hazardous Substances Labeling Act and regulations promulgated thereunder shall be deemed to be in violation of this Act and regulations promulgated hereunder.

Many of the other statutes cited by petitioner refer to the FHSA and the regulations thereunder for interpretations and definitions. *See,* e.g., Colo. Rev. Stat. § 25-5-508 (1992); Me. Rev. Stat. Ann. Tit. 7 § 504(3) (West 1992); Mich. Comp. Laws § 286.459 (1992); Tex. Health & Safety

Code Ann. § 501.025 (West 1992); Wash. Rev. Code § 70.106.100(5) (1992).

A review of each of the statutes cited by the petitioner reveals each is unique in its breadth and scope, some fully adopting the language of the FHSA, some merely referencing it, and others establishing their own standards. Thus, each of the statutes would have to be analyzed individually to determine whether or not the pre-emptive reach of the FHSA would invalidate the particular statute. The Fourth Circuit opinion, applying the scope of the FHSA pre-emptive provisions to a state common law tort claim, not a statute, does not present the Court with a proper forum to interpret state's hazardous substances statutes. Accordingly, petitioner does not raise an important question of federal law requiring resolution by the Court. More importantly, petitioner did not raise *this* argument at the District Court or at the Fourth Circuit.

CONCLUSION

Petitioner raises no special or important reasons for reviewing the Fourth Circuit opinion in this case. Although petitioner argues the unanimous opinion of the panel was fundamentally flawed, his failure to petition for rehearing or rehearing *en banc* belies his argument. The petition should be dismissed.

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In The

Supreme Court of the United States

October Term, 1992

MELVIN MOSS,

Petitioner,

v.

PARKS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE PETITIONER IN REPLY

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QUESTION PRESENTED FOR REVIEW

Whether Congress reserved to the Secretary of the Consumer Product Safety Commission the power to "fill in the interstices" of the broadly worded Section 2(p)(1)(F) of the Federal Hazardous Substances Act, 15 U.S.C. § 1261(p)(1)(F), as to risks of injury and illness not covered by any federal regulation, or whether, in the absence of any clarifying regulations promulgated by the Secretary, the states can interpret and enforce their interpretations of this paragraph in light of Congress' expressed intent that the states adopt and implement enforcement mechanisms which parallel and complement the enforcement mechanisms of the Federal Hazardous Substances Act.

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BRIEF OF THE PETITIONER IN REPLY

I

THIS CASE IS SIGNIFICANT BECAUSE IT AFFECTS THE LAWS OF ALL FIFTY STATES

This case presents the Court with an opportunity to determine, for the benefit of all fifty states, a significant question about the relationship between the states and the federal government; i.e., how much and what kind of power Congress intended the states to wield in the enforcement of labeling requirements for hazardous substances sold in interstate commerce.

The definitive resolution of this question will tell all fifty states whether they can continue to enforce failure to

warn claims under their tort laws. It will also tell them the extent to which they can administratively enforce their own labeling requirements.

Because this question affects so many states in so many ways, its resolution should not be put off until another day. The several states deserve to know as quickly as practicable the scope of their authority in this area.

II

THE CONFLICT BETWEEN THE SECOND, FOURTH, AND NINTH CIRCUITS IS REAL

Parks acknowledges that " . . . on the surface, it appears there is a conflict among the Second, Fourth, and Ninth Circuits regarding the preemptive nature of the FHSA." (Brief in Opposition, at pages 6-7) It then attempts to minimize this conflict by arguing that because *Toy Manufacturers of America Inc. v. Blumenthal*, 986 F.2d 615 (2nd Cir. 1993) and *Chemical Specialties Manufacturers Association v. Allenby*, 958 F.2d 941 (9th Cir. 1992) (cert. denied 1992) dealt with state statutes rather than tort claims, they are distinguishable.

All three cases, however, interpret the same preemption language in the FHSA. Only the Fourth Circuit held that states could not "fill in the interstices" of the very generalized labeling requirements of the FHSA and that the states could not require more specific warnings. Both the Second and the Ninth Circuits held that Congress did not remove this power from the states.

To the extent that Congress intended the FHSA to preempt state tort remedies, the legal reasoning which forms the basis of the Second and Ninth Circuit opinions would apply as well to tort claims as to statutes and regulations, just as the legal reasoning which forms the basis of the Fourth Circuit decision applies to statutes and regulations as well as it applies to tort claims.

Only this Court can determine which reasoning is correct.

III

AT LEAST ONE LOWER STATE COURT DISAGREES WITH THE FOURTH CIRCUIT HOLDING IN THE CASE AT BAR

Since filing the petition for certiorari, counsel have learned of a conflicting, albeit unpublished, opinion of the Ohio Court of Appeals. In *Jenkins v. James B. Day and Company*, No. 91AP1124, decided March 24, 1992 (1992 W.L. 63307),[1] the Ohio Court of Appeals held that "since the Federal Hazardous Substances Act does not clearly express an intention to preempt state court product liability actions, the statute must be construed to permit such actions." (Slip. Op. at 1152).

Jenkins was decided on summary judgment, which the court of appeals reversed, noting that there was a genuine issue of material fact about whether the warning label "really did provide an adequate affirmative statement of the principal hazard or hazards" associated

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[1] On September 23, 1992, the Ohio Supreme Court granted leave to appeal. *Jenkins v. James B. Day and Company*, Case No. 92-1002.

with the product. (Slip. Op. at 1152) *See*, 15 U.S.C. § 1261(p)(1)(E), which requires labels to include an "affirmative statement of the principal hazard or hazards."

If Melvin Moss had been injured in Ohio, and if Parks' preemption argument had been decided by the Ohio Court of Appeals rather than by the Fourth Circuit, his case would have been remanded for trial on the merits.

In addition to the conflict among the federal circuit courts of appeal, then, there is a conflict between the opinion of the Fourth Circuit and the opinion of at least one state appellate court on a question of vital interest to the states.

IV

THERE IS A GENUINE ISSUE OF MATERIAL FACT OVER THE ADEQUACY OF PARKS' LABEL

At pages 11-14 of its Brief in Opposition to Certiorari, Parks argues that its label complies with all of the requirements of the Federal Hazardous Substances Act. In particular, Parks argues that its warning to "Keep Away From Heat and Open Flame" satisfies the Act's requirement that labels contain a statement of the "precautionary measures describing the action to be followed or avoided . . . " to use the product safely.[2]

Parks is therefore arguing, as it did in the Fourth Circuit and as it must to prevail, that *any* statement of one

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[2] As noted in the Petition for Certiorari at pages 12-13, the adequacy of Parks' warning was seriously challenged by petitioner's expert, Dr. Karnes.

or more precautionary measures is adequate as a matter of law. The states, according to Parks and the Fourth Circuit, cannot determine, either by administrative regulation or tort proceeding, whether a warning is adequate because that determination would require the states to "fill in the interstices" or impose additional labeling requirements not specified in the FHSA. Under this interpretation of the Act, the power to determine the adequacy of a given label as well as the power to impose additional, or more specific, labeling requirements is reserved exclusively to the Secretary of the Consumer Product Safety Commission, even if the additional, more specific requirements do not conflict with the requirements of the FHSA.

If Parks' argument does anything, it emphasizes the need for a decision by this Court to determine whether any of the states has any enforceable tort remedy for inadequately labeled products. The answer to that question should be the same in all of the states, since Congress clearly intended the FHSA and its preemption rules to apply uniformly throughout the country.

CONCLUSION

For all of the above reasons, and for the reasons set forth in the Petition for Certiorari, the petition should be granted.

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